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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

JOHNNY REYNOLDS, *et al.*,

Petitioners,

-and-

CECIL PARKER, *et al.*,

Petitioners,

v.

G. M. ROBERTS, in his official capacity as Director of the Alabama Department of Transportation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether consent by non-minority, third-party-intervenor employees is necessary to approve settlements of minority employees' claims of racial discrimination, or is it sufficient to afford the non-minority employees a right to object and to be heard on whether the settlement satisfies strict scrutiny or should otherwise be approved?

Whether a district court lacks authority to enter a consent decree if one party withdraws its consent from all or part of a settlement after submission to the district court.

PARTIES TO THE PROCEEDINGS BELOW

The following individuals and entities are parties in the court below:

Plaintiff-Appellee Class Representatives and Plaintiff Class Members, now Petitioners:

Johnny Reynolds, individually on behalf of himself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated

Ouida Maxwell, individually on behalf of herself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated

Martha Ann Boleware, individually on behalf of herself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated

Peggy Vonsherie Allen, individually on behalf of herself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated

Jeffery W. Brown, individually on behalf of himself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated

Cecil Parker — member of the Plaintiff class

Robert Johnson — member of the Plaintiff class

Frank Reed — member of the Plaintiff class

Florence Belser — member of the Plaintiff class

C. Campbell Wilson — member of the Plaintiff class

Adams Intervenor-Appellant Class Representatives and Adams Class members of non-black employee class, now Respondents:

William Adams, on behalf of himself and all similarly situated persons (non-black employees)

Cheryl Caine, on behalf of herself and all similarly situated persons (non-black employees)

Tom Colquitt, on behalf of himself and all similarly situated persons (non-black employees)

William Flowers, on behalf of himself and all similarly situated persons (non-black employees)

Wilson Folmar, on behalf of himself and all similarly situated persons (non-black employees)

George Kyser, on behalf of himself and all similarly situated persons (non-black employees)

Becky Pollard, on behalf of herself and all similarly situated persons (non-black employees)

Ronnie Pouncey, on behalf of himself and all similarly situated persons (non-black employees)

Terry Robinson, on behalf of himself and all similarly situated persons (non-black employees)

Tim Williams, on behalf of himself and all similarly situated persons (non-black employees)

Defendant-Appellants, now Respondents:

Paul Bowlin, in his official capacity as Director of the Alabama Department of Transportation

Department of Transportation, State of Alabama

Department of Personnel, State of Alabama

State of Alabama

Donald Siegelman, in his official capacity as Governor or the State of Alabama

Ray Bass

Marvin Wagoner

Thomas G. Flowers, in his official capacity as Director of the State Personnel Department

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OPINIONS BELOW

The judgment of the Eleventh Circuit Court of Appeals denying Petitioners' Petitions for Rehearing En banc and for Rehearing of July 27, 2001, is not reported, and is attached at Appendix C, *infra*, pp. 45a-47a. The opinion of the Eleventh Circuit Court of Appeals issued on May 23, 2001, vacating and remanding the District Court's approval of a settlement is reported at 251 F.3d 1350, and is attached at Appendix A, *infra*, pp. 1a-15a. The decision of the District Court for the Middle District of Alabama approving the settlement is reported at 996 F. Supp. 1118, and is attached at Appendix B, *infra*, pp. 16a-44a.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals sought to be reviewed in this Court was entered on May 23, 2001. The judgment of the Eleventh Circuit Court of Appeals denying Petitioners' Petitions for Rehearing En Banc and for Rehearing was entered on July 27, 2001. On October 11, 2001, this Court granted Petitioners an extension until December 4, 2001, in which to file their Petition for Writ of Certiorari. This Petition for Writ of Certiorari is timely filed.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

In 1985, African-American employees and applicants of the Highway Department of the State of Alabama brought suit to remedy a continuing pattern and practice of racial discrimination in employment opportunities, naming the State and its Personnel and Highway Departments as

defendants. App. B-17a-18a. Plaintiffs alleged that the State had continued to discriminate on the basis of race in spite of a comprehensive permanent injunction entered in an earlier case brought by the United States. App. B-19a-23a. *See United States v. Frazer*, 1976 WL 729 (M.D. Ala. 1976); *United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970). The current case was certified as a class action in 1986 on behalf of defendants' African-American employees and applicants from 1979 forward. App. B-18a.

After extensive discovery, a bench trial was held for six months in late 1992. Conceding that the trial was going very badly for the defendants and likely to end in a judgment against them, defense counsel sought a recess of the trial in early 1993 to permit settlement negotiations to be resumed. App. B-18a; App. L-179a-184a; App. M-188a-190a. After ten months of negotiations, defendants settled the case by agreeing to a set of systemic injunctive remedies embodied in a Consent Decree and reserved monetary remedies for future proceedings. Appl. L-176a-179a; App. M-187a-190a; App. B-18a; App. F; App. J-166a-167a. The district court entered an Order acknowledging the settlement reached by the parties and giving preliminary approval to the Consent Decree on November 18, 1993. App. E-61a-62a. Notice of the settlement and a fairness hearing for final approval was mailed to the homes of employees of all races, and was published in various news media. App. F-63a,74a-76a.

Before the fairness hearing on the settlement was held, a small group of non-minority employees, now known as the Adams intervenors, moved to intervene to object to those parts of the proposed Consent Decree they believed to be race-conscious. App. B-18a,33a-39a. They brought no claims of their own, but limited themselves to objecting to the parts of the

settlement of the plaintiffs' claims they deemed race-conscious. *Id.* The district court granted limited intervention to permit them to challenge any race-conscious remedies on the alleged ground that "the factual predicate is not sufficient to warrant the type or extent of race-conscious relief contained in the proposed decree." App. G-97a-99a; App. B-17a & n.2,18a,33a-39a,44a. They were not granted full party status. *Id.* No appeal of that Order was ever taken.[1]

When the Adams intervenors presented their objections to the allegedly race-conscious provisions of the Consent Decree at the fairness hearing, the district court suggested that the parts of the Decree the intervenors conceded to be race-neutral be given final approval without waiting on the more lengthy consideration that would have to be given to provisions of the Decree argued to be race-conscious. App. B-18a-19a; App. I-106a. The Adams intervenors and the settling parties agreed to this suggestion by the court, separating the non-objectionable provisions of the original Consent Decree into Consent Decree I and submitting the remainder for court approval as Consent Decrees II and III.[2] An Order was then entered March 16, 1994, approving Consent Decree I and stating that "[t]he court will

1. Four years later, on April 24, 1998, the court certified the non-minority employees as a class for the limited "purpose of intervention, that is to challenge the race-conscious provisions of the consent decrees." App. K-173a. No appeal of that order was ever taken.

2. Consent Decree I contains provisions of the original Consent Decree that all parties agreed were race-neutral and no one objected to, while Consent Decree II contains provisions consented to by the defendants, but which the Adams intervenors argued to be race-conscious, and Consent Decree III contains provisions that all parties agree were race-conscious. App. H-101a; App. I-105a; *see also Reynolds v. ALDOT*, 996 F. Supp. 1118, 1120, 1125 (M.D. Ala. 1998).

consider final approval of Consent Decrees II and III separately at a later time." App. I-106a; R8-522-2. There was no appeal of that Order.

The current Petition involves the subsequent proceedings on the Adams intervenors' objections to ¶ 4 of Article Thirteen of Consent Decree II agreed to by the defendants. App. B-19a. Article Thirteen, ¶ 4 requires that black college-trained civil engineers be offered reclassification to Graduate Civil Engineer, the correct classification for persons having a degree in Civil Engineering or Civil Engineering Technology. App. D-52a; App. B-17a, 27a. The terms of Article Thirteen, ¶ 4 are as follows:

> *Offers of reclassification of incumbent employees to GCE:* Black persons (a) who are employed as of the effective date of the Settlement Decree with the Highway Department in jobs other than PCE, GRE, or GCE, and (b) have a degree in Civil Engineering or Civil Engineering Technology will, within 90 days following the effective date of the Settlement Decree, be offered reclassification to the GCE job.

App. D-52a; App. F-74a-76a; App. B-17a, 27a.

The purpose of Article Thirteen, ¶ 4 was to redress plaintiffs' claim that defendants operated a dual classification structure which placed white college-trained engineers in the Graduate Civil Engineer classification appropriate to their college degrees, but segregated black college-trained engineers in lower classifications requiring only a high school diploma, such as Engineering Assistant and other para-engineering classifications, regardless of the duties they were actually performing. App. B-33a-34a. To settle that

claim, defendants agreed to reclassify black college-trained engineers into the same Graduate Civil Engineer classification as their white peers so that there would no longer be a dual classification scheme. App. B-19a-26a, 33a-39a. The district court found that Article Thirteen "allowed certain African-Americans to enjoy the same opportunity whites had enjoyed . . . of employment in GCE" and "leveled the playing field" for this classification. App. B-33a-34a. Such a reclassification would merely *rename* the classification of the position *already held* by the employee and would not involve filling a vacancy in another position that would otherwise be subject to competition from other eligible employees. A reclassified employee continues to perform his same duties and position, albeit with the correct classification nomenclature and salary range.

The intervenors argued that ¶ 4 was race-conscious because it provided relief only to black college-trained engineers and that it could not survive "strict scrutiny" under the Fourteenth Amendment. App. B-35a-36a. The defendants originally opposed the intervenors and argued for approval of the entirety of Article Thirteen, including ¶ 4. App. L-182a-184a; App. M-187a-190a; App. D-47a-48a; App. F-74a-76a. The district court took the intervenors' objections under submission for decision, eventually overruling them and finding that ¶ 4 is not race-conscious, and that, even if it were, it satisfies strict scrutiny. App. B-24a-43a. The district court found that the agreed-upon remedy of reclassifying black college-trained engineers in the Graduate Civil Engineer classification appropriate to their education was not race-conscious because "[i]t simply puts incumbent African-Americans, who lack the EIT requirement, on a par

with whites, who lack the EIT requirement but still became, and continue to be, GCE's." App. B-34a.[3]

By the time this ruling was entered, the Transportation Department had retained new counsel and argued for the first time that it no longer believed that the settlement it entered in ¶ 4 satisfied "strict scrutiny" under the Fourteenth Amendment. App. B-34a-36a. The Department argued that newly emerging legal standards in the post-settlement period cast doubt on whether some parts of Consent Decree II and III would satisfy "strict scrutiny." B-17a n.2, 34a-39a. Defendants argued that Consent Decrees II and III should be "modified" under the principles of *Rufo v. Inmates of Suffolk County*, 502 U.S. 367 (1992).[4] The district court overruled the Transportation Department's argument at the same time

3. The EIT was a pencil-and-paper test that was not validated as required by the permanent injunction in the parallel case of *United States v. Frazer*, and which was used to racially segregate the Graduate Civil Engineer classification. App. B-19a-26a, 33a-36a. The permanent injunction in *United States v. Frazer* remains in effect and required that defendants recruit "black applicants for . . . Graduate Civil Engineer" and "validate all written tests used as screening devices in accordance with the EEOC Guidelines." *United States v. Frazer*, 1976 WL 729 *7 (M.D. Ala. 1976). The current defendants failed to do this for the EIT test or the GCE classification. The foregoing injunction in *Frazer* was incorporated by reference and made enforceable in this case in Article Nineteen, ¶ 1 and ¶ 6(c) of Consent Decree I. App. J-160a-163a. The district court did not enter its findings in support of an independent judgment against the defendants by the court itself, but merely as a part of approval of the defendants' settlement of the plaintiffs' claim regarding the racial segregation of the GCE classification and as a part of its ruling on the strict scrutiny objection of the Adams intervenors. App. B-26a-33a.

4. *See* ALDOT's *Brief Concerning Impact Of Recent Decisions On Validity Of Provisions Of Proposed Consent Decrees II and III* (Doc. no. 881 in district court); R9-881.

as it overruled the Adams intervenors' objections. App. B-36a-43a. Detailed findings of fact were entered by the district court on both the defendants' and the Adams intervenors' contentions regarding strict scrutiny, finding that ¶ 4 is not race-conscious and that it satisfies strict scrutiny in any event. App. B-36a-43a.

On appeal of the district court's order approving Article Thirteen, ¶ 4, the Adams intervenors argued at length that no settlement could be reached or approved without their consent, even though they had only been granted limited intervention for the purpose of asserting "strict scrutiny" objections. The Eleventh Circuit accepted the intervenors' argument. App. A-12a & n.12. In the words of the Court: "The consent of the intervenors is ... needed for the challenged paragraph to be entered as a 'consent decree.'" App. A-12a n.12. Without the intervenors' consent, the Eleventh Circuit held that the minority plaintiffs could not settle their claims and must proceed only by way of trial. App. A-11a-12a & n.12. The Court held: "Lacking the consent of all of the parties, the court obviously lacked the power to enter a decree purportedly based on consent, for 'it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all." App. A-13a.

The Court of Appeals did not consider the district court's findings of fact regarding "strict scrutiny." *Compare* App. A-9a-15a *with* App. B-33a-39a. Instead, the Court held that the new administration's post-settlement change in position regarding strict scrutiny operated to "withdraw" their consent to the settlement they had entered in ¶ 4. Rather than simply subjecting ¶ 4 to strict scrutiny, the defendants and the Adams intervenors' argument regarding strict scrutiny was held to have transformed the

settlement into a non-settlement entered as the district court's own judgment. App. A-11a-15a. The Eleventh Circuit held: "In this sense, these 'consent decrees' do not constitute consent decrees at all — notwithstanding what the district court or parties may call them." App. A-11a.

This Petition seeks review of the rulings that: (1) non-minority intervenors have a right to veto the settlement of minority employees' claims, rather than merely a right to object and be heard on whether such settlement satisfies strict scrutiny; and (2) defendants who agree to settle such claims can *unilaterally* withdraw their consent, rather than merely seek a modification or disapproval of the settlement *from the court* based on a perceived post-settlement change in legal standards. These rulings conflict with those of other Circuits, disregard the guidance of prior decisions of this Court, and significantly imperil principles regarding settlement agreements and consent decrees relied on by the United States, particularly in the areas of antitrust and civil rights enforcement.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are in Conflict As To Whether Non-Minority Employees Have a Right to Veto Settlements of Minority Employees' Claims of Racial Discrimination

The Eleventh Circuit has created an inter-circuit conflict on an important question of law by holding that the consent of non-minority employees is needed for black employees to settle lawsuits for racial discrimination against their

employers. App. A-11a-13a & n.12.[5] Seven Circuits have held that intervenors have a right to object and to be heard on "strict scrutiny" or other grounds, but not an unyielding right to veto or hold a settlement hostage by withholding their "consent" and forcing a trial on the merits. *Kirkland v. New York State Dep't of Correctional Serv.*, 711 F.2d 1117, 1126-28 (2d Cir. 1983), *cert. denied, Althiser v. New York Dep't of Correctional Serv.*, 465 U.S. 1005 (1984); *Tennessee Assoc. of Health Maintenance Org., Inc. v. Grier*, 262 F.3d 559, 567 (6th Cir. 2001); *Youngblood v. Dalzell*, 804 F.2d 360, 364 (6th Cir. 1986), *cert. denied*, *Cincinnati Firefighters Union, Local No. 48 v. Dalzell*, 480 U.S. 935 (1987); *United States v. Oregon*, 913 F.2d 576, 582 (9th Cir. 1990), *cert. denied, Makah Indian Tribe v. United States*, 501 U.S. 1250 (1991); *Dennison v. City of Los Angeles Dep't of Water & Power*, 658 F.2d 694, 696 (9th Cir. 1981); *United States v. Union Elec. Co.*, 132 F.3d 422, 430 (8th Cir. 1997); *Airline Stewards & Stewardesses Ass'n v. American Airlines*, 573 F.2d 960, 962 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978); *Dawson v. Pastrick*, 600 F.2d 70, 75-76 (7th Cir. 1979); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 173 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *United States v. Comunidades Unidas Contra La Contaminaeion*, 204 F.3d 275, 278-279 (1st Cir. 2000).

The Eleventh and Tenth Circuits, however, have reached the opposite result. App. A-11a-13a & n.12; *Sanguine Ltd. v. Dep't. of Interior*, 798 F.2d 389, 392 (10th Cir. 1986) (third party intervenors were entitled to have a consent

5. The Court in this case held: "The consent of the intervenors . . . is needed for the challenged paragraphs to be entered as a 'consent decree.' " App. A-11a-12a & n.12. As a result, "[l]acking the consent of all of the parties, the court obviously lacked the power to enter a decree purportedly based on consent. . . ." *Id.*

decree set aside and to proceed with a full trial on the merits), *cert. denied*, 479 U.S. 1054 (1987).

Certiorari should be granted to resolve the conflict among the Circuits concerning the power of non-consenting third-party intervenors to block entry of a consent decree and to force a trial on the merits of the claims and defenses sought to be settled. The conflict was created when the Eleventh Circuit held that third-party intervenors have not just a right to present evidence at a fairness hearing on the settlement, but a right to insist upon a full-blown trial on the merits of the underlying claims and defenses by withholding their consent to the settlement. App. A-11a-13a & n.12.

The Second Circuit has reached the opposite conclusion from the Eleventh Circuit, holding that

> [a]lthough non-minority third parties allowed to intervene in cases which involve consent decrees or settlement agreements implementing race-conscious hiring or promotional remedies have a sufficient interest to argue that the decree or agreement is unreasonable or unlawful, their interest in the expectation of appointment does not require their consent as a condition to any voluntary compromise of the litigation.

Kirkland, 711 F.2d at 1126-28. The Sixth Circuit has also recently ruled that intervenors have no right to veto a settlement by other parties, either by withholding consent or by insisting upon a trial on the merits of the settling parties' underlying claims and defenses. *Grier*, 262 F.3d at 566-67 (an intervenor "'does not have the power to block the decree merely by withholding its consent'" (quoting *Local No. 93*,

Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501, 528-29 (1986)). *Accord Youngblood v. Dalzell*, 804 F.2d 360, 364 (6th Cir. 1986) ("An intervenor is entitled to have its interest considered, but it may not block a consent decree, agreed to by the parties, by merely withholding its approval.").

The Seventh Circuit has identified a key flaw in the approach to consent now taken by the Eleventh Circuit: "It seems to us beyond serious dispute that no reasonable parties are going to settle any case if an intervenor can force them to litigate the merits of each claim." *Airline Stewards*, 573 F.2d at 962. The Court held that "the rule urged by the intervenors would most seriously discourage efforts to settle Title VII cases and we refuse to sanction such a result." *Id.*; *see also Johnson v. Transportation Agency, Santa Clara, CA*, 480 U.S. 616, 630 (1987) ("[V]oluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and Title VII should not be read to thwart such efforts.").[6] As a result, the Seventh Circuit held that

> the district court correctly declined to decide those issues relevant to the merits of the plaintiffs' claims prior to deciding merely whether the settlement agreement was appropriate. At most,

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6. This Court has repeatedly stressed the important role that settlements are accorded in the statutory scheme of Title VII. *See Local No. 93*, 478 U.S. at 515; *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 770-71 (1983); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 364 (1977); *Albemarle Paper Co. v. Moody*,4 22 U.S. 405, 417-18 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

> the court was required to permit APFA to intervene and offer it an opportunity to present to the court its members interests in the proposed remedy.

Airline Stewards, 573 F.2d at 562.

The First, Third, Eighth, and Ninth Circuits have reached the same result as the Second, Sixth, and Seventh Circuits, holding that third-party intervenors have no right of consent or veto over settlements by other parties. *United States v. Oregon*, 913 F.2d 576, 582 (9th Cir. 1990) (Settlements may be approved without consent of third party "so long as each party is given the opportunity to 'air its objections' on a reasonableness or fairness hearing."); *Dennison v. City of Los Angeles Dep't of Water & Power*, 658 F.2d 694, 696 (9th Cir. 1981) ("[T]he Fairness Hearing held before the consent decree was formally adopted adequately afforded the union an opportunity to present to the court its view of the adverse impact of the decree on non-minority employees."); *United States v. Union Elec. Co.*, 132 F.3d 422, 430 (8th Cir. 1997) (Upholding approval of consent decree over intervenors' objections); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 173 (3d Cir. 1977) (holding that interests of a third party in opposing a consent decree are limited to appropriateness of relief; intervenors cannot force a trial on the merits of the underlying claims being settled); *United States v. Comunidades Unidas Contra La Contaminaeion*, 204 F.3d 275, 278-279 (1st Cir. 2000) (holding that intervenors have only a right to object and be heard, not an "unconditional right to have an evidentiary hearing."). *See also Edwards v. City of Houston*, 37 F.3d 1097, 1119 (5th Cir. 1994) ("Neither intervenors nor objectors are entitled to hold consent decrees

hostage and require a full-blown trial in lieu of a fairness hearing."), *vacated on other grounds*, 78 F.3d 983 (5th Cir. 1996).[7]

The Eleventh Circuit's decision is an extension of a line of precedent in that Circuit involving intervention to protect collectively bargained rights that would be violated by the proposed consent decree. *See United States v. City of Hialeah*, 140 F.3d 968, 975 (11th Cir. 1998); *United States v. City of Miami*, 664 F.2d 435, 446 (5th Cir. 1981). The current decision acknowledged that fact: "The clear law of this circuit is that 'a consent decree requires the consent of all parties where legal rights would be adversely affected by the decree,' " App. A-11a n.12, citing *Hialeah, supra*. Until now, however, that line of precedent was limited to intervenors, mainly unions, who had pre-existing *contractual rights* that were being involuntarily forced to yield to a consent decree that they opposed. The current case involves no such contractual rights, but is an entirely new species of right derived, according to the Court below, from "rights under the Equal Protection Clause, Title VII and state-merit system law to compete for state jobs on a race-neutral basis." App. A-11a-12a & n.12. Such rights, however, have never been held to be absolute or incapable of being overcome through satisfaction of *strict scrutiny*. *See Local No. 93*, 478 U.S. at 528-529; *Kirkland*, 711 F.2d at 1128 ("The only interest, therefore, that intervenors possess is their mere

7. The Fifth Circuit applies a different rule where contractual or collectively-bargained rights of third parties are implicated. *See City of Miami*, 664 F.2d at 446-47. In the absence of contractual rights, the Fifth Circuit allows non-consenting, third-party intervenors only the right to be heard and present evidence at a fairness hearing. *See Edwards v. City of Houston*, 78 F.3d 983, 1003-04, 1006 (5th Cir. 1996).

expectation of promotion pursuant to possibly discriminatory selection procedures. This interest alone, though it entitles intervenors to be heard on the reasonableness and legality of the agreement, is not so strong as to require their consent to the agreement."). By equating contractual rights which are unyielding with Equal Protection or Title VII rights which are not, the Eleventh Circuit has created an unworkable approach to the use of settlements by the Government and private parties to enforce the Constitution and statutory rights, as well as a conflict among the Circuits *See, e.g., Kirkland*, 711 F.2d at 1126-27 (holding that the right of consent or veto in *City of Miami* is limited to consent decrees that infringe vested contractual or collectively-bargained rights); *Edwards*, 78 F.3d at 1003-04, 1006 (Fifth Circuit not extending intervenor's right to consent in *City of Miami* beyond contractual rights; holding that non-minority intervenors asserting Equal Protection rights against a consent decree have only a right to object and to be heard at a fairness hearing, including presenting evidence.).

There is a fundamental difference in a right to object on strict scrutiny grounds — grounds that can be overruled if such scrutiny is satisfied — and a right to withhold consent which cannot be overturned on any known grounds. The requirement that intervenors consent to settlements that meet the rigorous demands of strict scrutiny essentially renders impossible the settlement of any action based on discrimination; even race-neutral remedies are likely to draw objections from some intervenors. The imposition of the additional burden of obtaining the consent of intervenors would seriously and needlessly overburden the courts and constrain the work of the Department of Justice and the EEOC in resolving civil rights violations.

II. The Circuit Courts Do Not Agree on Whether a Party May Unilaterally Withdraw From a Consent Decree

A writ of certiorari should also be granted so this Court can resolve a conflict among the circuits regarding the effect of a party's attempt to withdraw its consent to a settlement that the parties have submitted to the court for entry. The Eleventh and Fifth Circuits have held that a party citing concerns about the possible legality of specific provisions of a proposed consent decree may withdraw its consent to those provisions and thereby deprive the district court of authority to rule upon its legality or to enter the decree. App. A-10a-12a, 14a-15a; *see also Ibarra v. Texas Employment Comm'n*, 823 F.2d 873, 879 (5th Cir. 1987). The Third, Fourth, and Ninth Circuits, however, have taken the opposite view, holding that a party's unilateral withdrawal of consent to a decree because of alleged illegality or any other reason does not deprive the court of authority to rule upon the decree's legality. *United States v. North Carolina*, 180 F.3d 574, 581-82 (4th Cir. 1999); *Collins v. Thompson*, 679 F.2d 168, 173 (9th Cir. 1982); *Pennsylvania Steel Foundry v. Secretary of Labor*, 831 F.2d 1211, 1220 (3d Cir. 1987).

According to the Eleventh Circuit, a party may escape the requirements of a consent decree, after agreeing to entry of that decree, merely by announcing that it "withdraws" its consent. App. A-10a-12a, 14a-15a. Applying its ruling to this case, the Eleventh Circuit held that the district court was forbidden from formally entering and enforcing the consent decree because "the Department has withdrawn its consent after informing the district court that it believes that [the consent decrees at issue] are unconstitutional in light of *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994), and *In re Birmingham Reverse Discrimination*

Employment Litig., 20 F.3d 1525 (11th Cir. 1994)." App. A-10a. "Lacking the consent of all of the parties, the court obviously lacked the power to enter a decree purportedly based on consent, for it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all." App. A-13a. The Eleventh Circuit did not itself consider whether the decree was unconstitutional as the Department alleged; it simply held that the withdrawal of consent vitiated the settlement regardless of whether it was lawful.

The Fifth Circuit is aligned with the Eleventh Circuit on this issue. *Ibarra v. Texas Employment Comm'n*, 823 F.2d 873 (5th Cir. 1987). In *Ibarra* the defendant withdrew its consent to a proposed decree on grounds of mistake. The defendant Texas Employment Commission ("TEC") had believed that the settlement it agreed to would satisfy the United States Department of Labor, thereby allowing it to continue to collect federal funds to support its unemployment insurance program. Only after the TEC agreed to the settlement did the Department of Labor inform it that the settlement would be deemed a violation of the statute, causing the Department to stop funding the Texas program. The Fifth Circuit held that the district court could not enforce the consent decree, because "[m]istake is as much a ground for voiding a consent decree as is fraud or collusion." *Id.* at 879. *Cf. United States v. City of Fort Smith*, 760 F.2d 231 (8th Cir. 1985) (modifying consent decree for mutual mistake).

By contrast, in *United States v. North Carolina*, 180 F.3d 574 (4th Cir. 1999), the Fourth Circuit held that a party may not unilaterally withdraw its consent to a settlement, but at most may seek a modification from the court based on changed circumstances. In the period between the submission

of the agreement and judicial consideration, the North Carolina legislature had enacted a statute that appeared to require attorney general and legislative approval of the settlement, approval which had not been obtained. *Id.* The Fourth Circuit concluded that neither the State's desire to withdraw nor the newly enacted statute provided grounds for refusing to enter the decree. "[A] party's change of heart regarding a settlement is not a valid basis upon which to refuse approval." *Id.* at 581. The new law likewise was not a valid reason to refuse approval of the consent decree; under these circumstances "the proper course is for the consent decree to be entered as the parties agreed and then to allow the parties to seek modifications from the district court as the circumstances may justify." *Id.* at 582; *see also Moore v. Beaufort County*, 936 F.2d 159, 164 (4th Cir. 1991) (entering a consent decree because "[a]t one point, the Board of Beaufort County felt that limited voting was desirable. Now it does not. The district court is not required to gauge the current sentiment of the Board before implementing a plan that has previously been approved" by the Board.).

The Ninth Circuit agrees with the Fourth Circuit's reasoning. In *Collins v. Thompson*, 679 F.2d 168, 173 (9th Cir. 1982), the court articulated the basis for its view that withdrawal of consent did not prevent enforcement of the decree. "The requirement of judicial approval is not to protect the negotiating parties, but to protect unrepresented parties, and thus the negotiating parties are bound by any contract they make, subject of course to the condition subsequent of judicial disapproval." *Id.*

Similar decisions have been reached concerning settlements that must be approved by regulatory agencies rather than courts. The regulated party may not withdraw

from a settlement even if final regulator approval of the agreement is still pending. *See, e.g., Pennsylvania Steel Foundry & Machine Co. v. Secretary of Labor*, 831 F.2d 1211, 1220 (3d Cir. 1987) (employer not permitted to withdraw from settlement of OSHA enforcement claim; allowing withdrawal "would impede the Secretary's use of settlements as a means for enforcing the Act in other cases"); *George Banta Co. v. NLRB*, 604 F.2d 830, 835-836 (4th Cir. 1979) ("[T]o permit a respondent unilaterally to withdraw from a formally executed settlement agreement prior to Board approval would undermine the continued efficacy of the settlement process and encourage its use as a dilatory tactic."), *cert. denied*, 445 U.S. 927 (1980).

The view taken by the Third, Fourth, and Ninth Circuits is supported by this Court's decision in *Evans v. Jeff D.*, 475 U.S. 717 (1985). In that case, the parties settled a class action on terms that waived an award of attorneys' fees and costs, but one of the settling attorneys then filed a motion not to approve that waiver and to award him fees, arguing that the fee waiver was improper and should not be entered. *Id.* at 722-23 & n.5. The Ninth Circuit agreed in an opinion that "invalidated the fee waiver and left standing the remainder of the settlement." *Id.* at 724. This Court, in affirming the district court's enforcement of the consent decree, necessarily concluded that the plaintiffs' initial consent to the fee waiver *remained effective*, notwithstanding their misgivings. The Court held that a party to a settlement cannot selectively withdraw from one of its terms while leaving the remainder standing, regardless of whether the challenged term of the settlement is argued to be contrary to law. The Court acknowledged that "changed circumstances may justify a court-ordered modification of a consent decree . . . *after* the decree has been entered," but held that this did

not permit selective disavowal of one term of the settlement while retaining the benefits of all the other terms of the bargained-for exchange. *Id.* at 726-727 (emphasis added).

The Eleventh Circuit's decision permits a party to a settlement to oppose or withdraw from one part of the settlement they have agreed to, while retaining all the benefits of the remainder of the settlement — *res judicata*, cessation of a trial that was going badly for them, avoidance of the risk of an adverse judgment finding classwide racial discrimination, reduced litigation costs, and a greater hand in shaping the relief entered against them than they would have had absent negotiation of the Consent Decree. *See* App. M-187a-189a; App. L-179a-184a (defendants' affidavits attesting to the benefits they received from the settlement). As this Court has noted on several occasions:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 683 (1971); *see also Carson v. American Brands, Inc.*, 450 U.S. 79, 86-87 (1981); *Local No. 93*, 478 U.S. at 522.

The plaintiffs would not have entered into the settlement if they had known that defendants might try to selectively withdraw from the parts they disliked while keeping the benefits they received in exchange. Although plaintiffs knew that they must confront the "strict scrutiny" objections of *non-parties* to the settlement, such as the Adams intervenors, they did not agree to undertake the risk that the defendants themselves would attack their own settlement while insisting upon retaining the benefit of the bargain they had extracted in return. Plaintiffs entered the settlement because of defendants' promise to give its full support in advocating approval of the *entire settlement*, as expressed in the defendants' affidavits and stipulation filed in support of finding that strict scrutiny standards had been satisfied. App. M-187a-189a; App. L-179a-184a; App. D-60a.[8] The defendants filed affidavits in the district court attesting to the benefits they received from the settlement in exchange for the remedies they agreed to, including the remedy in ¶ 4 of Article Thirteen currently at issue. *Id.*

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8. Defendants stipulated in Article Nineteen, ¶15 of the Consent Decree as follows:

> The goals and remedies provided for by this Decree, including, but not limited to the goals and appointments provided for by Article Eleven, Twelve and Thirteen, have been fashioned so as to be in full compliance with the factors applied in evaluating "race conscious" remedies, including the compelling interest of the defendants in providing equality of employment opportunity, the imbalance in certain jobs, the tailoring of the goals to the minimum necessary, the fact that the goals provided for by this Decree are of temporary duration, and the conclusion that nothing in this Decree unnecessarily trammels the rights of white applicants or employees.

App. D-60a.

The Third, Fourth and Ninth Circuits do not permit a settling party to decide for itself to withdraw its consent without a court determining whether it has valid grounds for nullifying the agreement it freely entered. Even where a party claims that the settlement was entered by mistake or that its consent was never given or effective, all other Circuits, and traditional contract law principles, require a *court determination* that the settlement should be undone or modified. *See, e.g., United States v. City of Fort Smith*, 760 F.2d 231, 233 (8th Cir. 1985) (requiring a court to determine if a settlement agreement was entered by "mistake"); *King v. Walters*, 190 F.3d 784, 790 (7th Cir. 1999) (Seventh Circuit held that if the State official in question had the authority to bind the State to the settlement, an issue which had to be resolved on remand, the State could not unilaterally withdraw from consent decree.).

III. The Rule in *Reynolds* Undermines the Strong Federal Policy Encouraging Settlements and Compromises the Effectiveness of Numerous Federal Government Agencies by Limiting Their Power to Obtain and Enforce Consent Decrees

If allowed to stand, the *Reynolds* ruling threatens the orderly administration of justice in a wide array of federal court actions, not just in Title VII class actions. Under the Eleventh Circuit's ruling, all parties, including limited-purpose intervenors, must consent to any settlement and a party may unilaterally rescind a settlement agreement that includes a consent decree for any reason or no reason at all.[9]

9. Even if the rule in *Reynolds* were limited to cases in which the repudiation is based on illegality concerns raised by new law, the case would still threaten the orderly administration of justice. (Cont'd)

Numerous federal agencies rely heavily on settlement agreements and consent decrees to enforce the laws they are charged to administer. The Antitrust, Environment, and Civil Rights divisions of the Department of Justice, the Environmental Protection Agency, the Department of Labor, and the EEOC, to name a few, rely on settlement agreements and consent decrees to remedy violations of law without the burden on resources that would be required if full-blown trials were held in every case. By giving intervenors the power to vitiate settlement agreements, the Eleventh Circuit's ruling threatens the effectiveness of these agencies. Even if the defendants to an enforcement action agree to settlement, intervenors could derail the settlement causing unnecessary expense and imposing delay on both sides.

Likewise, allowing parties on either side of a consent decree to withdraw their consent to selected provisions of the decree threatens to disrupt the judicial system. Already complex issues of legality and fairness take on an entirely different scale when paired with a right of unilateral withdrawal by either party at any point in the proceedings. Federal agencies may well be willing to settle matters on

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(Cont'd)

The *Reynolds* decision *prohibits* the trial judge from assessing the bona fides of that claim, and does not require any finding that the provision actually violates the law. Newly-elected government officials or newly-appointed corporate executives can now simply walk away from agreements made by their predecessors if they can point to any new case that might conflict with the terms or spirit of the agreement. They can revoke settlement decisions because of changes in government or corporate policy that otherwise would have no relevance to the settlement, wasting the resources all the parties expended to resolve the case. That is what occurred here.

creative terms proposed by litigants subject to a determination of fairness and lawfulness, but not if they must fear that the proposal is a mere tactic to delay the court or that a change in leadership of a party might cause a withdrawal of consent. That a party can withdraw its consent months after reaching a settlement might introduce more uncertainty than the government can reasonably accept.

The Court should accept certiorari to determine whether the Eleventh Circuit has properly articulated the rights of intervenors and parties in class action settlements.

CONCLUSION

The ability to settle class actions has been substantially impaired by the rules announced by the Eleventh Circuit in this case. Moreover, the conflicts in the circuits impose substantially disparate burdens on the United States and other litigants depending on the circuit from which the matter arises. Because most of the cases at issue involve the interpretation and application of federal law, such disparity significantly disrupts federal and private enforcement efforts. The Court should accept certiorari to resolve those conflicts.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MAY 23, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6102
D.C. Docket No. 85-00665-CV-T-N

JOHNNY REYNOLDS, individually and on behalf of himself and as a representative of a class of black employees of the Highway Department, State of Alabama, similarly situated,

Plaintiff-Appellee,

WILLIAM ADAMS, CHERYL CAINE, TIM COLQUITT, WILLIAM FLOWERS, et al.,

Intervenors-Plaintiffs-Appellants,

versus

JIM BUTTS, in his official capacity as Director of the Alabama Department of Transportation, HALYCON VANCE BALLARD, individually and as Director of Personnel Department, State of Alabama; et al.,

Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Alabama

(May 23, 2001)

Appendix A

Before TJOFLAT and HULL, Circuit Judges, and PROPST*, District Judge.

TJOFLAT, Circuit Judge:

This is the latest in a series of appeals arising out of a dispute involving the Alabama Department of Transportation (the "Department"), classes of black merit system employees and prospective merit system employees (the plaintiffs), and a class of white employees (the "Adams Intervenors"). *See Reynolds v. Roberts*, 202 F.3d 1303 (11th Cir. 2000) ("*Reynolds I*"); *Reynolds v. Roberts*, 207 F.3d 1288 (11th Cir. 2000) ("*Reynolds II*"). The question presented in this appeal is whether the district court may, *sua sponte*, enter an injunction that affects the legal rights of the parties without either (1) entertaining evidence and ruling upon the objections of the affected parties or (2) obtaining the consent of the affected parties. We hold that such *sua sponte* entry of an injunction is improper. We therefore reverse.

I.

The lengthy procedural history of this litigation is set forth in our opinions in *Reynolds I*, 202 F.3d at 1305-11, and *Reynolds II*, 207 F.3d at 1292-98. Here, we recite an abbreviated version of that history and then focus on the factual and procedural history relevant to the instant appeal.

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*Honorable Robert B. Propst, U.S. District Judge for the Northern District of Alabama, sitting by designation.

Appendix A

A.

The named plaintiffs brought this suit against the Department[1] in May 1985, on behalf of all black employees and former employees of the Department and all unsuccessful black applicants for positions within the Department. Alleging race discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and the Equal Protection Clause of the Fourteenth Amendment, the plaintiffs sought monetary and injunctive relief under those statutes and under 42 U.S.C. § 1983. In October 1986, the court certified three plaintiff classes.[2]

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1. In addition to the Department, the plaintiffs sued various state officials. We refer throughout to all of the defendants simply as "the Department." *See Reynolds I*, 202 F.3d at 1306 n.1.

2. The first class consisted of any black person who unsuccessfully applied for a merit position in the Department at any time after May 21, 1979. The second class included all blacks employed by the Department at any time after May 21, 1979, who were permanent employees under the Department's merit system and therefore eligible for, but had been denied, promotion. The third class consisted of a portion of the blacks employed by the Department at any time after May 21, 1979, as temporary employees. During their employment in the Department, these employees had applied for, but had been denied, merit positions. The district court subsequently combined these latter two classes of black employees, meaning that there are now two plaintiff classes: (1) all black merit system employees employed at any time since May 21, 1979; and (2) all blacks — whether currently employees of the Department or not — who unsuccessfully applied for merit system employment at any time since May 21, 1979. The first class is represented by plaintiffs Johnny Reynolds, Ouida Maxwell, and Martha Ann Boleware; the second class is represented by plaintiffs Peggy Vonsherrie Allen and Jeffrey Brown.

Appendix A

After the parties joined issue and engaged in discovery, they entered into settlement negotiations. In 1988, and again in 1991, they presented a proposed consent decree to the district court for approval. On each occasion, some members of the plaintiff classes objected to the entry of the decree; the district court sustained their objections and refused to enter the decree.

In June 1992, the case proceeded to trial before the court. Near the end of the plaintiffs' case, the parties asked the court to recess the proceeding indefinitely so that they could engage in further settlement negotiations. The court granted their request. In November 1993, they reached a partial settlement in the form of a proposed consent decree. The proposed decree provided a range of prospective class-wide injunctive relief. Among other things, it set hiring and promotion quotas for blacks — 33% of the positions in each job classification in the Department would be set aside for blacks. To ensure an adequate pool for this set-aside program, the decree directed the Department to mount an aggressive recruiting campaign at historically black colleges and universities. Finally, the decree required the Department to establish a grievance procedure for its employees.

The parties presented the proposed decree to the district court. The court, in turn, scheduled a hearing for January 19, 1994 to entertain objections from members of the plaintiff classes or others likely to be affected (like white employees of the Department) by the terms of the proposed decree. On January 13, a group of white Department employees (the Adams Intervenors) moved the court for leave to intervene on behalf of the Department's non-black employees to challenge the race-conscious provisions of the proposed decree — specifically, the 33% quota requirement for all job

classifications in the Department. The court granted the motion, *Reynolds v. Roberts*, 846 F. Supp. 948, 953-54 (M.D. Ala. 1994), and subsequently certified an additional class, consisting of the Department's non-black employees.[3] Importantly, the court did not permit the Adams Intervenors to present additional factual evidence in support of their objections. *Id.* at 954. Instead, the court allowed the Adams Intervenors to argue, based only on evidence already received in the plaintiffs' case, "that the factual predicate is not sufficient as a matter of law to warrant the type or extent of race-conscious relief contained in the proposed decree." *Id.*

The January 19 hearing was held as scheduled. Over 200 people attended the hearing, including many non-black employees of the Department. The objections to the race-conscious aspects of the proposed consent decree were such that the parties withdrew it and, with leave of court, went back to the drawing board. By late February 1994, the parties agreed to divide the previously proposed decree into three parts, which they called (and still call) Consent Decrees I, II, and III. Consent Decree I contained the provisions that all sides agreed provided only race-neutral prospective relief. Consent Decrees II and III contained provisions that were acceptable to the plaintiffs and the Department, but were opposed as race-conscious by the Adams Intervenors.[4]

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3. This class is represented by William Adams, Cheryl Caine, Tim Colquitt, William Flowers, Wilson Folmar, George Kyser, Becky Pollard, Ronnie Pouncey, Terry Robinson, and Tim Williams.

4. As discussed *infra* note 11 and accompanying text, the Department has subsequently disclaimed agreement to Consent

(Cont'd)

Appendix A

B.

The parties submitted Consent Decree I to the district court for approval, and, on March 7, the court held a hearing on the fairness of the proposal. No one other than the parties' attorneys appeared at the hearing, and no one objected to the entry of the decree. The court approved the decree and, by order entered March 16, 1994, adopted Consent Decree I in full.[5] The court noted at that time that it would "consider final approval of Consent Decrees II and III separately at a later time." The court explicitly held that "[p]laintiffs' and intervenors' motions with respect to Consent Decree II [are] denied without prejudice."[6]

(Cont'd)
Decrees II and III due to what it views as changes in the relevant law since the original consent decree was negotiated in 1993.

The Adams Intervenors have always objected to the entirety of Consent Decrees II and III.

5. Consent Decree I is composed of a series of "Articles" that revamped the process by which the Department hires, promotes, classifies, and pays its employees. The decree abolished the system of "employment registers" from which positions were filled and promotions were granted, and created new qualifications and procedures for hiring and promotion. It also created new procedures for, among other things, rotation of job duties, recruitment, and training. None of the Articles of Consent Decree I provides special benefits or procedures for black employees of the Department.

6. The motions to which the court referred were a motion by the plaintiffs to approve Consent Decree II and a motion by the intervenors for proposed revisions to the provisions of Consent Decree II. The intervenors also objected to the entry of Consent Decree II without their proposed revisions.

Appendix A

On April 16, 1997, three years after the entry of Consent Decree I, the court entered a money judgment for $34,732,487 (back-pay plus interest) in favor of one of the plaintiff classes. The court's rationale was that Consent Decree I operated as an admission of classwide liability by the Department — that the Department had discriminated against the plaintiff classes, and the individual members thereof, with respect to its hiring and promotion decisions. *See Reynolds v. Ala. Dep't of Transp.*, 996 F.Supp. 1156 (M.D. Ala. 1998) (memorandum opinion explaining the basis for the entry of judgment on April 16, 1997). The Department and the Adams Intervenors appealed, and on February 2, 2000 we vacated both the district court's judgment on money damages and its determination that Consent Decree I established classwide liability. *Reynolds I*, 202 F.3d at 1311.

On September 15, 1997,[7] the parties resumed trial on the remaining issues.[8] In the midst of this trial, the district

7. The timing is important because the district court entered the paragraph at issue in this appeal *after* deciding that Consent Decree I established liability but *before* we issued our opinion in *Reynolds I* (although the parties had taken their appeal in *Reynolds I* prior to the entry of the challenged paragraph, *see Reynolds I*, 202 F.3d at 1307 n.3). The liability of the Department therefore necessarily formed the basis for the court's decision-making process regarding the entry of the challenged paragraph. Because *Reynolds I* held that Consent Decree I did not establish classwide liability, the district court, on remand in the instant case, should not make a determination about the appropriateness of the challenged paragraph against a background of classwide liability deriving from Consent Decree I.

8. The initial trial in 1992 was limited (by pre-trial order) to issues of classwide liability. Consent Decree I provides, in Article

(Cont'd)

court twice queried the Adams Intervenors about their objections to paragraph four of proposed Article Thirteen (which had been a part of Consent Decree II).[9] Then, on January 23, 1998, without a motion before it and without further argument or briefing from the parties, the court entered an order and injunction adopting the paragraph. *Reynolds v. Ala. Dep't of Transp.*, 996 F.Supp. 1118 (M.D. Ala. 1998). No other portions of Consent Decrees II and III have been entered. Thus, it is this sole paragraph from Consent Decree II that is at issue in this appeal.[10]

(Cont'd)
Twenty, for further proceedings to resolve the monetary and non-monetary remedies for individual class members, including the named plaintiffs and intervenors. Consent Decree I did not "in and of itself entitle[ ] any such class member to such remedies."

9. The court first asked the intervenors to address the legality of paragraph four of Article Thirteen on October 2, 1997. The court asked the intervenors to restate their objections on January 14, 1998. That same day, the court asked for a clarification of the Department's position. The Department stated unequivocally that it objected to the challenged paragraph. Two days later, on January 16, the court asked the plaintiffs how many black employees would be affected by entry of the challenged paragraph. One week later, the court entered an order and injunction adopting the challenged paragraph.

10. For the sake of completeness, we note that the district court's permanent injunction preventing the use of the grievance procedure by white employees of the Department was entered on March 3, 1998. This injunction was appealed by the Department and the Adams Intervenors on March 9-10, 1998, and was vacated by our opinion in *Reynolds II*, 207 F.3d at 1302.

Appendix A

The challenged paragraph reads:

> Offers of reclassification of incumbent employees to GCE [Graduate Civil Engineer]:
>
> Black persons (a) who are employed as of the effective date of the Settlement Decree with the Highway Department in jobs other than PCE [Professional Civil Engineer], GRE [Graduate Registered Engineer], or GCE, and (b) have a degree in Civil Engineering or Civil Engineering Technology will, within 90 days following the effective date of the Settlement Decree, be offered reclassification to the GCE job.

II.

A district court's decision to approve, modify, or not modify a consent decree is reviewed for abuse of discretion. *Stovall v. City of Cocoa*, 117 F.3d 1238, 1240 (11th Cir. 1997). As explained below, however, this appeal does not involve a consent decree as such but rather an injunction issued *sua sponte* by the district court. The district court's action was in the form of a decision made as a matter of law, on the court's own motion. We therefore apply *de novo* review.

III.

A.

As described *supra* Part I.B, the district court approved and entered Consent Decree I on March 16, 1994. Such entry

was proper because all parties agreed to Consent Decree I. The parties disagreed as to Consent Decrees II and III, however, because they contained provisions that at least some of the parties believed to be race-conscious. The court did not, therefore, enter Consent Decrees II and III.

The plaintiffs contend that Consent Decrees II and III remain pending before the district court for entry. We disagree, particularly since the Department has withdrawn its consent after informing the district court that it believes that Consent Decrees II and III are unconstitutional in light of *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994), and *In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525 (11th Cir. 1994).[11]

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11. *Ensley Branch* and *In re Birmingham*, which both address the legality under Title VII and the Equal Protection Clause of certain race-conscious provisions of consent decrees entered into by government employers, were decided after the plaintiffs and defendants had negotiated the original consent decree and presented it to the district court for approval. In November 1995, the district court ordered the plaintiffs, defendants, and intervenors to address the legality of Consent Decrees II and III in light of *Ensley Branch* and *In re Birmingham*.

The Department concluded that these cases "substantially clarified the application of previous Supreme Court precedent" to race-conscious provisions in consent decrees. The Department also noted that these cases evinced a more skeptical approach to race-conscious settlements than had prior Eleventh Circuit decisions. The Department thus concluded that the race-conscious provisions of Consent Decrees II and III violated both the Equal Protection Clause and Title VII. Therefore, the Department objected to the entry of

(Cont'd)

Appendix A

The plaintiffs alone currently support the entry of Consent Decrees II and III. In this sense, these "consent decrees" do not constitute consent decrees at all — notwithstanding what the district court or parties may call them.[12] *See White v.*

(Cont'd)
Consent Decrees II and III and asked the district court to modify Consent Decrees II and III to eliminate race-conscious provisions because the obligations placed on the Department under those agreements had "become impermissible under federal law." Moreover, as described *supra* note 9, the court knew that the Department specifically objected to the entry of the challenged paragraph. *See also Reynolds v. Ala. Dep't of Transp.*, 996 F.Supp. 1118, 1120 (M.D. Ala. 1998) ("The defendants . . . object to ¶ 4.").

The positions of the Adams Intervenors and the plaintiffs on Consent Decrees II and III were unchanged by *Ensley Branch* and *In re Birmingham*. The Adams Intervenors believed the cases bolstered their claims that the proposed decrees violated both Title VII and the Equal Protection Clause, while the plaintiffs contended that Consent Decrees II and III satisfied the constitutional and statutory standards regarding race-conscious relief set forth in those cases.

12. Even if the challenged paragraph could somehow be construed as having the "consent" of the plaintiffs *and* the defendants, it clearly does not have the consent of the intervenors. This is important because the intervenors have legal rights at stake in this litigation, namely rights under the Equal Protection Clause, Title VII, and state merit-system law to compete for state jobs on a race-neutral basis. The clear law of this circuit is that "a consent decree requires the consent of all parties whose legal rights would be adversely affected by the decree." *United States v. City of Hialeah*, 140 F.3d 968, 975 (11th Cir. 1998); *see also White v. Alabama*, 74 F.3d 1058, 1073 (11th Cir. 1996) ("In this circuit, a decree that provides a remedy agreed to by some, but not all, of the parties cannot affect the rights

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Alabama, 74 F.3d 1058, 1073 (11th Cir. 1996). The most apt description of Consent Decrees II and III at present — particularly in light of the Department's concern about their legality — is that they are the plaintiffs' proposed decrees. The district court was apparently aware of the difficulty inherent in calling this challenged paragraph a "consent decree" — albeit a paragraph lifted from what the parties call "Consent Decree II" — when it fashioned its order in the form of an injunction.[13] *Reynolds v. Ala. Dep't of Transp.*, 996 F.Supp. 1118, 1129 (M.D. Ala. 1998).

(Cont'd)
of a dissenting party."); *id.* at 1076 (Black, J., specially concurring) ("Once a party intervenes, he becomes a full participant and is entitled to have his claims litigated."). The consent of the intervenors is thus needed for the challenged paragraph to be entered as a "consent decree."

13. The court entered the injunction ordering enforcement of the challenged paragraph in what appears to be the form of a permanent injunctive order. It did so, however, on the basis of only "the plaintiffs case." *Reynolds v. Ala. Dep't of Transp.*, 996 F.Supp. 1118, 1125 n.19 (M.D. Ala. 1998). The court stated that its findings were "only preliminary" and that all the "comments throughout [the] order about the evidence should be taken as such." *Id.* On the one hand, if the court meant the injunction to be a preliminary injunction, the court erred by failing to utilize the four-part standard for preliminary injunctions. *See Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 238 F.3d 1300, 1308 n.18 (11th Cir.), *cert. denied*, __ S. Ct. __, 69 U.S.L.W. 3619 (2001) (noting that preliminary injunctive relief may only be granted if the moving party shows (1) a substantial likelihood of success on the merits; (2) irreparable injury; (3) that threatened injury to the movant outweighs any injury to the opposing party; and (4) an injunction is not adverse to the public interest).
(Cont'd)

Lacking the consent of all of the parties, the court obviously lacked the power to enter a decree purportedly based on consent, for "it is the parties' agreement that serves as the source of the court's authority to enter any judgment at all." *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 522, 106 S. Ct. 3063, 3075, 92 L. Ed. 2d 405 (1986). A district court may not "require the parties to accept a settlement to which they have not agreed." *Evans v. Jeff D.*, 475 U.S. 717, 726, 106 S. Ct. 1531, 1537, 89 L. Ed. 2d 747 (1986). Pulling one isolated paragraph out of a proposed consent decree runs counter even to what these parties originally agreed upon back in 1993, for a "settlement must stand or fall as a whole." *Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114, 1120 (11th Cir. 1995) (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1331-32 (5th Cir. 1977)).

B.

Dispensing with the notion that Consent Decrees II and III were still pending as such with the district court when the challenged paragraph was entered, we now turn to whether the plaintiffs even moved the court for an injunction which included the challenged paragraph. The record shows no such motion before the court. On February 13, 1997, the plaintiffs moved the court to hold the Department and its director in

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On the other hand, if the court meant this to be a permanent injunction, then the court erred by admittedly basing its conclusion on the evidence of only one party. In the text, we treat the court's order as a permanent injunction based on preliminary evidence and, as in *Reynolds II*, we are forced to conclude that "that dog won't hunt." *Reynolds II*, 207 F.3d at 1300.

contempt. At the same time, the plaintiffs asked the court for sanctions and for entry of Consent Decrees II and III. Nowhere in the court's January 23, 1998 order did the court indicate that the challenged paragraph was being entered as a contempt sanction or in response to a separate motion by the plaintiffs. In fact, the plaintiffs' contempt motion from February 1997 was still pending when the briefs were filed in the instant case.[14] The only Article Thirteen issues even before the court in January 1998, when the injunction was entered, related to a September 5, 1997 recommendation from a magistrate judge. This recommendation did not address paragraph four of Article Thirteen.

The only remaining alternative is that the plaintiffs' and defendants' joint motion for entry of the consent decree (in its entirety, before it was broken into three parts) from November 1993 was still pending before the court. But, as we have said, the Department withdrew its consent from Consent Decrees II and III because of alleged changes in the intervening law. Thus, any joint motion by the plaintiffs and defendants from November 1993 could no longer be valid. The district court acknowledged that the Department no longer consented to the entry of this paragraph by noting at the beginning of its order that "[t]he defendants and the Adams intervenors . . . object to [the entry of] ¶ 4." *Reynolds*, 996 F.Supp. at 1120. Because the plaintiffs did not move the

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14. Had the challenged injunction been entered in response to the motion to hold the Department in contempt, the district court would have issued a show cause order requiring the defendants to show cause why they should not be held in contempt for non-compliance. *See Thomason v. Russell Corp.*, 132 F.3d 632, 634 n.4 (11th Cir. 1998). This did not occur.

court for entry of this challenged paragraph, we must conclude that the court acted *sua sponte* in entering the challenged paragraph in its order and injunction.

Given that the challenged paragraph was entered on the court's own initiative, we find it procedurally improper. We have previously frowned upon a district court's *sua sponte* transformation of a motion to enforce a consent decree into a motion for a preliminary injunction, *see Thomason v. Russell Corp.*, 132 F.3d 632 (11th Cir. 1998), and a district court's *sua sponte* transformation of an application for injunctive relief to enforce a consent decree into an application for a declaratory judgment, *see Reynolds II*, 207 F.3d at 1300-01. We see no difference in this situation; in fact, the instant situation may be more egregious. In any event, we reiterate what we stated in *Thomason* and *Reynolds II* — there are proper procedures to be followed for the enforcement and litigation of issues relating to consent decrees. Because we have outlined those procedures in other places, we need not reiterate them here. *See, e.g., Reynolds II*, 207 F.3d at 1298; *Wyatt v. Rogers*, 92 F.3d 1074, 1078 n.8 (11th Cir. 1996); *Newman v. Alabama*, 683 F.2d 1312, 1317-19 (11th Cir. 1982).

REVERSED and REMANDED.

APPENDIX B — ORDER AND INJUNCTION OF THE DISTRICT COURT OF UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION DATED AND FILED JANUARY 23, 1998

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

CIVIL ACTION NO. 85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF TRANSPORTATION, et al.,

Defendants.

ORDER AND INJUNCTION

The issue presented, in this long-standing lawsuit in which African-American plaintiffs have charged defendants Alabama Department of Transportation and Alabama State Personnel Department with employment discrimination, is the approval and adoption of ¶ 4 of article XIII of a partial settlement reached by the parties in 1993 and submitted to the court in 1994. Paragraph 4 provides:

Appendix B

"Offers of reclassification of incumbent employees to GCE:

> Black persons (a) who are employed as of the effective date of the Settlement Decree with the Highway Department in jobs other than PCE [professional civil engineer], GRE [graduate registered engineer], or GCE [graduate civil engineer], and (b) have a degree in Civil Engineering or Civil Engineering Technology will, within 90 days following the effective date of the Settlement Decree, be offered reclassification to the GCE job."[1]

The defendants and the Adams intervenors (who are non-black employees of the Transportation Department) object to ¶ 4. For the reasons that follow, the court concludes that ¶ 4 should be approved and adopted.[2]

I. BACKGROUND

In this lawsuit, initiated in May 1985, the plaintiffs charged that the defendants discriminated against them in employment because they are African-Americans, in violation

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1. Paragraph 4 is contained in what is now commonly referred to as 'consent decree II.' *See* motion to implement unopposed parts of proposed consent decree, filed March 7, 1994 (Doc. no. 533), attachment 2.

2. In addition to briefs filed in 1994 and 1996, the parties orally argued on October 3, 1997, and January 14 and 16, 1998, issues related to the meaning and implications of ¶ 4.

of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§ 1981a, 2000e through 2000e-17, the fourteenth amendment to the United States Constitution, as enforced by 42 U.S.C.A. § 1983, and 42 U.S.C.A. § 1981. The plaintiffs represent a class of African-American merit and non-merit system employees and unsuccessful applicants. The defendants include the Alabama Department of Transportation, the Alabama State Personnel Department, and several State officials. The jurisdiction of the court has been invoked pursuant to 28 U.S.C.A. § 1343 and 42 U.S.C.A. § 2000e-5(f)(3).

The parties reached a full settlement of this case in 1988, but the court refused to approve the proposed consent decree in the face of numerous objections from the members of the plaintiff class. *See Reynolds v. King*, 790 F. Supp. 1101 (M.D. Ala. 1990). Litigation then resumed.

A trial was held in 1992 that extended over several months, but ended before completion when the parties announced that they might be able to settle the litigation again. In 1993, the parties reached a second, albeit only partial, settlement. In the wake of this new partial settlement, the court allowed a group of non-class members — consisting mostly of white employees of the Department of Transportation and now commonly referred to as the 'Adams intervenors' — to intervene and challenge any race-conscious provisions in the settlement. *See Reynolds v. Roberts*, 846 F. Supp. 948 (M.D. Ala. 1994).

The new partial settlement was submitted to the court for approval in 1994. One part of the settlement was approved

by the court and incorporated into what is now commonly known as 'consent decree I.'[3] The court has reserved ruling on other parts of the settlement. Paragraph 4 is contained in those parts on which the court has reserved ruling.[4]

A.

The remedial provision in ¶ 4 of article XIII of the new settlement was based on evidence presented at trial in 1992, which reflected that the Transportation Department had intentionally refused to hire African-Americans as GCEs because of their race. The evidence was, in substance, as follows.

For the first three-quarters of this century, the State of Alabama and its agencies excluded African-Americans, because of their race, from employment other than in low and menial positions, and throughout the last quarter of this century, despite outstanding court orders, the Transportation Department manipulated, or even circumvented, State personnel procedures to avoid hiring and promotion of African-Americans into responsible and non-menial jobs.

Frazer Litigation: In the late 1960s, the United States brought an action against the Alabama State Personnel Department challenging personnel practices which it contended intentionally discriminated against African-American applicants and employees. In 1970, in *United States*

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3. *Reynolds v. Alabama Department of Transportation*, 1994 WL 899259 (M.D. Ala. March 16, 1994) (Doc. no. 553).

4. *See supra* note 1.

v. Frazer, 317 F. Supp. 1079 (M.D. Ala. 1970), this court agreed with the United States, and found that agencies of the State of Alabama had engaged in a State-sanctioned policy of manipulating and circumventing the State's personnel procedures to avoid the hiring and promotion of African-Americans.[5] 317 F. Supp. at 1084-87. The court found intentional, pervasive, systematic exclusion and avoidance of black employees and applicants throughout numerous State departments.

The evidence demonstrated that racial discrimination was accomplished in several ways, many of which involved manipulations of personnel practices and procedures to exclude eligible and qualified black employees from competing for jobs. The evidence overwhelmingly showed refusals to hire, or even to interview, African-Americans who had qualified and appeared on the certificates of eligibles, despite an urgent and constant need to fill positions. *Id.* at 1087. It also showed that agencies maintained racially segregated facilities in their buildings. *Id.* Indeed, John S. Frazer, director of the Personnel Department, testified to his belief that the race of applicants was a legitimate factor for consideration in selecting employees. *Id.* at 1085.

The court found that "defendants' systematic refusal to appoint Negro applicants and their preference for lower-ranking white applicants constitute unlawful race

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5. When originally filed, this case was styled *United States v. Frazer*, civil action no. 2709-N (M.D. Ala.). In it now styled *United States v. Ballard*, civil action no. 2709-N (M.D. Ala.), because, after December 4, 1981, Halycon Vance Ballard replaced John S. Frazer as the named defendant in the case.

discrimination[,] ... a clear violation of the equal protection clause of the Fourteenth amendment." *Id.* at 1089-91. The court entered similar findings on the defendants' recruitment and advertising practices.

The court entered an order broadly prohibiting State officials from "engaging in any employment practices, including recruitment, examination, appointment, training, promotion, retention, or any other personnel action, for the purpose or with the effect of discriminating against any employee, or actual or potential applicant for employment, on the ground of race or color." *Id.* at 1090. The court further imposed what has come to be known as the 'no-bypass rule,' which provides that State officials "shall not appoint or offer a position to a lower-ranking white applicant on a certificate in preference to a higher-ranking available Negro applicant, unless the defendants have first contacted and interviewed the higher-ranking Negro applicant and have determined that the Negro applicant cannot perform the functions of the position, is otherwise unfit for it, or is unavailable." *Id.* at 1091.

Six years later, in the same litigation, similar allegations were again before the court. The United States charged that State personnel practices were systematically and deliberately manipulated to prevent blacks from competing with white applicants for jobs and promotions. In an order entered August 1976, the court found a pattern and practice of racial discrimination in employment in the Transportation Department (then known as the Highway Department). *See United States v. Frazer*, civil action no. 2709-N, 1976 WL 729 (M.D. Ala. Aug. 20, 1976).

Specifically, the court found that the new defendants, including the Transportation Department, "avoided compliance with the decrees in this case by examining job registers maintained by the Personnel Department of the State of Alabama and by requesting certificates of eligibles only at times when no blacks were available for certification." *Id.* at *4. The court also pointed out other evidence of discriminatory practices, including maintaining registers on a non-continuous basis (establishing a register and not adding any persons until that register is exhausted and another exam is administered), or 'closing' a register for as long as two years. In this way, all-white registers were maintained. *Id.* at *5-*6. The court observed, "Progress toward erasing the effects of prior exclusionary practices upon the basis of race has been minimal and in many instances non-existent." *Id.* at *6.

The court also recounted the story of one black applicant's attempts to obtain a position with the State, and the elaborate lengths to which the Personnel Department went to avoid him. This occurred despite the fact that he was first on the register for the position, and that the Alabama Development Office Assistant Director found him "extremely well qualified." *Id.* at *4-*5.

The court entered a more detailed order requiring, among other things, that defendants validate all written tests. It also ordered that State officials "shall insure that blacks who are appointed to . . . job classifications common to several agencies shall be appointed to all agencies in which such vacancies occur. No defendant shall attempt to avoid this provision by deferring requests for certification until blacks

are unavailable." *Id.* at *7. One of the injunction's specific provisions required that the defendants "engage in intensive recruitment for black applicants for ... Graduate Civil Engineer." *Id.*

Other Evidence Introduced at the 1992 Trial: The Federal Highway Administration found that, during the years following the court's 1976 findings, defendants continued to engage in the same pattern and practice of racial discrimination. By use of these practices, the evidence reflected, defendants could preclude black applicants from applying for the historically white job classifications for prolonged periods, extending such exclusion into the late 1980s for some larger and more important job classifications. The most obvious of these practices, condemned and enjoined in 1976, was the refusal to permit applications for years at a time while the existing register used to fill vacancies was either all-white or predominantly white. In the 1980s, when African-Americans began to apply for positions where registers had been exhausted, applicants were suddenly subjected to a battery of new screening criteria and examinations. No evidence established that these criteria were job-related, nor validated as required by the *Frazer* injunction.

The first qualification imposed on applicants for the GCE positions, an entry level job, was that they graduate from an 'accredited' program, which eliminated graduates from most predominantly black schools. In mid-1979, however, a graduate of Southern University's accredited Civil Engineering program learned of a GCE job at the Transportation Department and attempted to apply for it. Josh Chapple

testified at trial, and the Department's internal documents corroborated his testimony, that, instead of processing Chapple's application in the normal fashion according to the established criteria and procedures, both the Transportation Department and the Personnel Department subjected him to a series of delays and special requirements. Among them were: (1) a requirement that he pass the 'engineer-in-training,' also known as the 'EIT,' examination, though the defendants did not require that of white applicants; (2) a requirement that he take additional college course work in geology and transportation science before they would accept his application, though they did not post such course work on the job announcement or require it of white applicants; and (3) various other roadblocks catalogued on a daily basis in a Transportation Department internal memorandum dated November 3, 1978.[6] In another, later in-house memorandum, dated March 16, 1984, the Transportation Department's minority recruiter wrote: "[A] door to potential black GCE's from predominantly black Southern University was slammed when, on November, 1978, the qualifications which had been sufficient for many years for white GCE's were found to be unsatisfactory" for the first black applicants who satisfied them.[7]

Finally, when two African-American applicants on the register were to be hired because of the no-bypass rule of *Frazer*, and ten more African-American graduates appeared

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6. Plaintiffs' supplemental memorandum in support of the goals of proposed consent decree, filed March 7, 1994 (Doc. no. 538), appendix A.

7. *Id.*

on the GCE employment register, the defendants suddenly abolished the register. The new job announcement included the EIT test as a posted requirement. The defendants, in an unabashed echo of their earlier racially discriminatory treatment of Chapple, declared the ten African-American applicants ineligible to reapply, despite their having successfully competed and ranking high enough on the register to be selected and despite, the affirmative duty placed on the defendants by the *Frazer* injunction to "engage in intensive recruitment for black applicants for ... Graduate Civil Engineer."[8] *Frazer*, 1976 WL 729, at *7.

Other evidence established that the Transportation Department had posted no job announcements, nor received applications in certain job categories, for as long as seven years, far longer than the two years that the court condemned as discriminatory in *Frazer*. For example, the defendants refused to receive applications for Civil Engineer-I and -II positions from 1974 to 1987, except for one three-week period in 1979 and a second three-week period in 1984. Defendants still did not take Civil Engineer-II applications up to the entry of consent decree I — opening that classification for only nine weeks in 20 years. Similar statistics were presented for many other job classifications. Evidence also showed maintenance of multiple registers, which supervisors could preview before determining from

8. This event was described in the March 16, 1984, memorandum as follows: "Perhaps the most undigestible example of practices which negatively affect minority employment is the one in which the GCE register which included ten minorities was abolished on March 30, 1983 by the apparently arbitrary inclusion of the requirement that the EIT examination be passed." *Id.*

which to fill a job and which they could then use to manipulate the selection process so as assure the selection of persons whom the supervisors wanted, despite the relative qualifications of those under consideration and despite any roadblock the no-bypass rule might have place in the selection process.[9] The 1976 *Frazer* injunction specifically condemned previewing registers. *Id.* at *4.

B.

Article XIII, which was contained in the settlement submitted to the court in 1994, was intended to redress what appeared to be the Transportation Department's intentional effort to prevent African-Americans from being considered for GCE and higher positions by use of the EIT requirement beginning in 1983. Article XIII contained, in addition to ¶ 4, three other provisions relevant to the issue before the court: ¶¶ 1, 5, and 10.

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9. Multiple registers were formed simultaneously for certain job classifications with applicants being eligible for each register on the basis of different entrance requirements. The types of registers formed simultaneously for a single job classification included: (a) open-competitive registers; (b) promotional registers; and (c) reemployment registers. Applicants are determined to be eligible for each of these types of registers on the basis of different criteria. Applicants eligible for both an open-competitive and a promotional register will be ranked on both, but their scores and ranks on each register can, and often will, be different because the scoring procedures differ from one register type to another and the number and identity of persons on each type register are different. An applicant who is ineligible for one type of register can be eligible for the other type.

Appendix B

Paragraph 1: Subpart (a) of ¶ 1 abolished use of the EIT test. It provides that, "On and after the effective date of the Consent Decree, EIT status and any associated tests will not be utilized as a prerequisite for the job of GCE."[10] The premise of ¶ 1 is obvious: to rid the Transportation Department of a device that had been adopted for racially-discriminatory reasons.

Paragraph 4: This paragraph, as stated, requires the reclassification of incumbent African-Americans to GCE positions if they meet the qualifications for the positions absent the EIT requirement. Paragraph 4 is therefore premised on the fact that, absent the EIT requirement, these African-American would have become GCEs, as had similarly-qualified white incumbents become GCEs in the past before the discriminatory imposition of the EIT requirement.

Paragraph 5: This paragraph requires that the Transportation Department offer, with back pay, to 20 African-American plaintiff class members, the jobs of GCE

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10. Subparts (b) and (c) of ¶ 1 provide:

"(b) After the goals provided by the Consent Decree for the GCE job have been achieved, then in evaluating eligibles certified to it for the GCE job, the Highway Department may consider EIT status as a factor in the selection process but may not appoint a white applicant in preference to a black applicant based solely on EIT status.

"(c) Personnel will not utilize the EIT for scoring, ranking or certifying applicants for the position of GCE."

or other higher positions they would now hold with the Transportation Department "in the absence of the EIT and associated requirements."[11] Subpart (a) of ¶ 5 requires that the Transportation Department make offers to ten specifically-named persons,[12] while subpart (b) requires that the Transportation Department make offers to an additional ten unnamed persons who meet certain eligibility

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11. There is no express language in ¶ 5 requiring that the Transportation Department pay back pay to these 20 persons. The parties have, however, consistently interpreted the paragraph to require such.

12. Subpart (a) of ¶ 5 provides:

> "The following persons (if they have Civil Engineering or Civil Engineering Technology degrees) will be offered employment in the GCE job or in the job they would now hold with the Highway Department in the absence of the EIT and associated requirements (including the recency of degree requirement), whichever is higher, with the following credited service dates:
>
> | | |
> |---|---|
> | Alfedo Acoff | March 30, 1983 |
> | Peggy Vonsherie Allen | March 30, 1983 |
> | Christopher Azaubuike | March 30, 1983 |
> | Jeffery W. Brown | March 30, 1983 |
> | Willie F. Franklin | March 30, 1983 |
> | Macon Hinton | March 30, 1983 |
> | Wayne M. Leonard | March 30, 1983 |
> | Ronald D. Newsome | March 30, 1983 |
> | Adenrele Odutola | March 30, 1983 |
> | Rickey Richardson | March 30, 1983" |

requirements.[13] The Transportation Department is required

13. Subpart (b) of ¶ 5 provides:

"Up to a maximum of 10 persons, plus one replacement for each person named in Paragraph 5(a) who is not appointed for any reason, black persons (if they have Civil Engineering or Civil Engineering Technology degrees) will (subject to availability) be appointed to the GCE job or the job they would now hold with the Highway Department in the absence of the EIT and associated requirements (including the recency of degree requirement), whichever is higher, provided that they satisfy the following conditions: (i) They applied during the period since the EIT requirement was adopted for the GCE job or they would have applied for the GCE job but for the EIT requirement, and (ii) They were or would have been rejected because of not having EIT status, or other associated characteristics (including, but not limited to passing the FOE test and satisfying the recency of degree requirement) and (iii) They had degrees in Civil Engineering and Civil Engineering Technology at the time they applied or would have applied, and (iv) They would have been certified-out for GCE in the absence of their rejection for lack of EIT status or other associated characteristics as defined above."

Subparts (c), (d), and (e) provide:

"(c) The credited service date of such of the persons specified in Paragraph 5(b) above as accept such offers will be agreed to by the parties before notice of the offer of employment is given to them, subject to the following: (i) No such credited service date shall be earlier than

(Cont'd)

to make a "reasonable and good faith effort" to find these additional persons.[14] However, under article XIII, if one of the persons specifically named in subpart (a) "is not appointed for any reason," then the Transportation Department is required to appoint an additional unnamed person in accordance with subpart (b). The result of this requirement is that if one of the persons named in subpart (a) declines an offer, then the Transportation Department must make eleven offers pursuant to subpart (b), and so on, until the Transportation Department has made a "reasonable and good faith" effort to find 20 African-American persons who will accept employment with the Transportation Department.[15]

(Cont'd)

March 30, 1983. (ii) The standard for determining such service dates will be the approximate date each such person would have been appointed in the absence of the EIT and associated requirements.

"(d) The maximum number of persons provided for by Paragraph 5(a) and Paragraph 5(b) together is 20.

"(e) The State Personnel Department agrees to accept the appointment by the State Highway Department of such persons named or specified in Paragraphs 5(a) and 5(b) above as accept such offer, notwithstanding the inconsistency of such appointment (if any) with the Alabama Merit System Act."

14. *Reynolds v. Alabama Department of Transportation*, 1996 WL 420834, at *2 (M.D. Ala. April 23, 1996).

15. *Id.*

Appendix B

Paragraph 5 reaches out beyond the circle of incumbent African-Americans, who could be viewed as obviously the victims of the EIT requirement and who were identified and addressed in ¶ 4. However, because ¶ 5 was not limited to incumbents, ¶ 5 sets forth additional requirements — that the African-Americans seeking relief under the provision have actually applied and been rejected for a GCE or higher position because of the EIT requirement, or would have applied for the position in the absence of the EIT requirement — to make sure that it targets only those African-Americans who could be reasonably viewed as victims of the EIT requirement.[16]

Paragraph 10: This paragraph requires the Transportation Department to identify all prior applicants for GCE jobs and "all black persons with degrees in Civil Engineering and Civil Engineering Technology from the colleges and universities which it will recruit under the terms of this Consent Decree," and to offer jobs to those who, upon their re-application and certification out by the Personnel Department, are determined by the Transportation Department to have been previously rejected because of the EIT requirement or associated requirement or who, upon their re-application and certification out by the Personnel Department, "can show a reasonable probability that they would have applied in the absence of the EIT or associated requirements."[17]

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16. Indeed, it appears that nine of the ten persons named in subpart (a) were on the ten-person list that was abolished in 1983. The record, however, does not explain this one-person discrepancy.

17. Paragraph 10 provides:

(Cont'd)

Appendix B

(Cont'd)

"*Notice to applicants for GCE rejected because of the EIT requirement:*

(a) To the extent it is able to do so, the Personnel Department will provide to the Highway Department the names and last known addresses for all black persons with degrees in Civil Engineering and Civil Engineering Technology who applied for the GCE job and were rejected because of not having EIT status or any associated characteristics as defined above. The Highway Department shall make reasonable efforts to identify the names and last known addresses of all black persons with degrees in Civil Engineering and Civil Engineering Technology from the colleges and universities which it will recruit under the terms of this Consent Decree.

(b) The Highway Department will in turn give notice to such persons by certified mail, addressed to them at their last known address, advising them of the discontinuance of EIT status and associated characteristics as a prerequisite for the GCE job and enclosing a blank application form so they can if they wish reapply with Personnel for the GCE job.

(c) Those who reapply and are certified-out by the Personnel Department to the Highway Department for the GCE job will be offered employment by the Highway Department in the GCE job, assuming they satisfy the qualification standards of the job and, if they did not apply for the GCE job in the past, can show a reasonable probability that they would have applied in the absence of the EIT or associated requirements, including, but not limited to, the FOE exam and the recency of degree requirement.

(Cont'd)

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The entire settlement was divided into three consent decrees. One of the consent decrees, commonly referred to as 'consent decree I,' was approved by the court on March 16, 1994.[18] Consent decree I contains ¶¶ 1, 5, and 10 of article XIII. Consent decree II, which contains ¶ 4, is still under submission with the court.

II. DISCUSSION

As stated, the defendants and the Adams intervenors object to ¶ 4 of article XIII. Based on the evidence presented at the 1992 trial, the court must reject their objections.

The trial reflected that in the early 1980s, the Alabama Department of Transportation adopted the EIT requirement with the specific intent to limit the opportunity of African-Americans to be employed in GCE and higher positions.[19] As long as the applicant registers were white, the Transportation Department hired without the EIT requirement. Only when

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(Cont'd)

> (d) Those not offered employment and hired in accordance with Paragraph (c) above would remain on the register under the conditions of the Register Purging provisions above."

18. *Reynolds v. Alabama Department of Transportation*, 1994 WL 899259 (M.D. Ala. March 16, 1994) (Doc. no. 553).

19. The court recognizes and emphasizes that this picture is based solely on the plaintiffs' case. The defendants have yet to present their entire case. The findings are therefore only preliminary, and all the court's comments throughout this order about the evidence should be taken as such.

blacks became eligible, as a result of court-ordered relief, to appear on the employment register in significant numbers, did the Transportation Department, suddenly and precipitously, impose the EIT and foreclose these black applicants from competing for these positions.

Article XIII was therefore intended to redress this discrimination. It essentially allowed certain African-Americans to enjoy the same opportunity whites had enjoyed (for many years when African-Americans were prohibited completely from working for the Transportation Department) of employment in GCE and other higher positions without having to meet the EIT requirement. The article leveled the playing field so that all persons, whites as wells as blacks, could be considered for these jobs under the same criteria.

A.

The defendants and the Adams intervenors object to ¶ 4 because, as they contend, it is not targeted to those African-Americans who were victims of the EIT requirement. But, of all article XIII's provisions, ¶ 4 is probably the most targeted. It simply puts incumbent African-Americans, who lack the EIT requirement, on a par with whites, who lack the EIT requirement but still became, and continue to be, GCEs.

The defendants and the Adams intervenors maintain that these incumbent African-Americans are not victims of the EIT requirement because they never 'applied' for GCE jobs. The defendants and the Adams intervenors argue that ¶ 4, therefore, differs in this important respect from ¶¶ 5 and 10 because these latter provisions offer redress only to African-

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Americans who applied for GCE or higher positions or, at least, would have applied in the absence of the EIT requirement. The defendants and the Adams intervenors overlook an important aspect of the manner in which the defendants effected their racially discriminatory intent, however. The evidence at trial reflected that incumbent whites were often sought after, and, through manipulation of the selection process, hand-picked for positions, despite the relative qualifications of all applicants and despite even the barrier of the no-bypass rule. The selection process, in which applications were solicited and people applied, was, if anything, only a ruse — that is, only a paper process to give the appearance of having utilized the competitive process — to allow Transportation Department supervisors to pick and choose whom they wanted, regardless of the requirements of the selection process. Because incumbent whites often did not have to go through any 'real' competitive process in which they applied for positions, neither should blacks. Paragraphs 5 and 10, unlike ¶ 4, impose the application requirement — that is, that those seeking relief have, at least, applied and been rejected, or presented evidence that, but for the EIT requirement, they would have applied — because the hand-picking was generally limited to instances in which incumbents were selected for positions.

The defendants and the Adams intervenors argue that ¶ 4 is racially discriminatory because its focus is only on African-Americans. But this limitation is logical. Because the EIT requirement was imposed between 1983 and 1994 to discriminate against African-Americans, the relief would have to identify and focus on African-Americans. As stated, the premise behind ¶ 4 is that, in the absence of the EIT

requirement, African-American incumbent employees would have become GCEs, as had similarly-situated white incumbents become GCEs in the past, during the period when African-Americans could not even compete for such positions and before the imposition of the EIT requirement. To be sure, there are probably also some white persons who, although not the intended targets of discrimination, were denied GCE positions between 1983 and 1994 because they lacked EIT status. But this fact does not detract from the fact that black incumbents, as intended victims of racial discrimination, are entitled to redress for the discrimination they suffered. It may be that similarly-situated whites, though not intended victims of discrimination, should be made GCEs as well, but that matter is not before the court.

B.

The defendants and the Adams intervenors argue that, because ¶ 4 is targeted to only African-American employees, it must be subjected to 'strict scrutiny' analysis. Assuming that ¶ 4 must be subjected to such analysis, it still passes it.

It is now axiomatic that, absent necessary justification, the fourteenth amendment to the United States Constitution prohibits governmentally-imposed racially-discriminatory classifications. Under the equal protection clause, this court must apply strict scrutiny to race-conscious relief voluntarily implemented by a public employer, irrespective of whether the relief is embodied in merely a personnel decision or in a consent decree. The "purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the [defendant] is pursuing a goal important enough to warrant use of a highly

suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S. Ct. 706, 721 (1989). Thus, there are two prongs to the strict scrutiny analysis: first, "any racial classification 'must be justified by a compelling governmental interest,' " and, second, "the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.' " *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 285, 106 S. Ct. 1842, 1852 (1986) (plurality opinion) (citations omitted). *See also Johnson v. Transportation Agency*, 480 U.S. 616, 107 S. Ct. 1442 (1987); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1564 (11th Cir. 1994); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1552 (11th Cir. 1994); *In re Birmingham Reverse Discrimination Emp. Lit.*, 20 F.3d 1525, 1534 (11th Cir. 1994), *cert. denied*, 514 U.S. 1065, 115 S. Ct. 1695 (1995); *Sims v. Montgomery County Comm'n*, 890 F. Supp. 1520, 1531-33 (M.D. Ala. 1995) (Thompson, J.), *aff'd*, 119 F.3d 9 (11th Cir. 1997) (table); *Sims v. Montgomery County Comm'n*, 887 F. Supp. 1479, 1486-89 (M.D. Ala. 1995) (Thompson, J.), *aff'd*, 119 F.3d 9 (11th Cir. 1997) (table); *Shuford v. Alabama State Bd. of Educ.*, 846 F. Supp. 1511, 1520 (M.D. Ala. 1994) (Thompson, J.). The Supreme Court has indicated that the government "unquestionably has a compelling interest in remedying past and present discrimination." *United States v. Paradise*, 480 U.S. 149, 167, 107 S. Ct. 1053, 1064 (1987) (plurality opinion). Whether race-conscious relief serves a remedial purpose with respect to past discrimination is an evidentiary issue. The court need not make 'formal findings' of discrimination;

rather, there must be a "strong basis in evidence" for the conclusion that the consent decree or voluntary action remedies past discrimination. *Croson*, 488 U.S. at 500, 109 S. Ct. at 725 (quoting *Wygant*, 476 U.S. at 277, 106 S. Ct. at 1849); *see also Sims*, 887 F. Supp. at 1487.

The race-conscious relief before the court, therefore, is "lawful if it represents a 'narrowly-tailored' effort to remedy past . . . discrimination" against African-Americans in the Transportation Department. *Stuart v. Roache*, 951 F.2d 446, 449 (1st Cir. 1991), *cert. denied*, 504 U.S. 913, 112 S. Court. (1992). The Supreme Court has set forth several factors to determine whether race-conscious relief is narrowly tailored: the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market (the 'over-or under-inclusiveness' of the relief); and the impact of relief on the rights of third parties. *Paradise*, 480 U.S. at 179, 107 S. Ct. at 1070; *Shuford*, 846 F. Supp. at 1528.

Paragraph 4 meets this demanding requirement: First, the court has set forth the extensive background history of race discrimination in the Alabama Department of Transportation. As stated, ¶ 4 targets African-American incumbents who are similarly situated to white incumbents who became GCEs without having to meet the EIT requirement during the period in which African-Americans were prohibited, simply because of their race, from becoming GCEs. Paragraph 4 is appropriate and necessary if relief is to be afforded to these African-Americans. Second, the provision is extremely short-lived; indeed, it is a one-time

event. *See Paradise*, 480 U.S. at 178, 107 S. Ct. at 1070 (plurality opinion) (race-conscious relief was narrowly tailored because court expressed hope that relief would be a "one-time occurrence") (quoting *Paradise v. Prescott*, 585 F. Supp. 72, 76 (M.D. Ala. 1983) (Thompson, J.)); *Paradise*, 480 U.S. at 186, 107 S. Ct. at 1074 (Powell, J., concurring) (agreeing with plurality opinion because, among other things, "The District Court imposed the one-for-one promotion requirement only on one occasion, when it ordered the promotion of eight blacks and eight whites to the rank of corporal in February 1984"). Third, the provision is neither under-inclusive nor over-inclusive, and does not establish any quotas for the Transportation Department. It applies only to a narrow group of African-Americans. Indeed, it appears that fewer than a handful of African-Americans could even benefit from the provision today.[20] Fourth and finally, the impact on third parties is, at most, marginal. Paragraph 4 merely puts African-American incumbents on a par with white incumbents of equal qualifications. Or, more to the point, the paragraph puts African-American incumbents on a par with similarly-situated third-parties. As stated, it essentially momentarily levels the playing field between African-Americans and all others.

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20. Since 1994, when consent decree I was approved, the seven or eight African-Americans to whom ¶ 4 would have applied have become, or have become eligible for, GCE or higher jobs under other provisions in the consent decree I (for example, in a companion order entered today, three African-Americans eligible for relief under ¶ 4 (Omoshalewa Olowokere, Edward L. Baldwin, and Emanual Oranika) are to receive promotions to GCE or higher positions based on ¶ 5(b) of article XIII) or have been otherwise promoted to such jobs. The record is unclear at this time, but it appears that there may be only one African-American (Benjamin Egiebor) to whom ¶ 4 still applies.

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The above conclusion is based on the assumption that ¶ 4 requires strict-scrutiny analysis. In *Sims*, this court discussed how it is difficult, in an analytical sense, to distinguish 'any' settlement, to the extent and in the sense that it specifically targets an allegedly victimized African-American for relief, from race-conscious settlements that are traditionally viewed as requiring strict scrutiny. The court wrote:

> "Admittedly, as the Sims plaintiffs and the Scott intervenors argue, the Fifth, Sixth, and Tenth Circuit Courts of Appeals have held that 'a good faith settlement of a claim of past discrimination constitutes a legitimate, nondiscriminatory reason for making employment decisions.' *Marcantel v. State of La., Dept. of Transp. & Dev.*, 37 F.3d 197, 202 (5th Cir.1994). *See also Carey v. U.S. Postal Service*, 812 F.2d 621 (10th Cir.1987); *EEOC v. McCall Printing Corp.*, 633 F.2d 1232 (6th Cir.1980). These cases, however, are not clear as to when a settlement is immune from a third-party attack because it is 'a good faith settlement' and when a settlement must be subjected to 'strict scrutiny' to withstand such an attack. Perhaps a distinction can be drawn between individual claims brought by one person and those brought by several persons, or between individual claims and class claims, or between individual relief and systemic relief. The court cannot say, however, that these differences, although existing in fact, logically and equitably warrant differences in treatment. Perhaps the best answer to the problem is that in *Marcantel*, *Carey*, and *McCall*, the appellate

courts were essentially applying strict scrutiny analysis in concluding that the settlements were entered into in 'good faith' and thus were not subject to attack from adversely affected third parties. For example, in *Marcantel*, the Fifth Circuit Court, while noting the 'the negative impact on other employees,' 37 F.3d at 201, wrote:

> 'This Court is convinced that the consideration of a conciliation agreement which results in a consent decree as an act of discrimination against employees not benefitted by that agreement would create a situation in which each settlement would spark new rounds of litigation, settlement of claims would be discouraged, and the courts would be continually faced with stale claims.
>
> . . .
>
> 'We conclude that a good faith attempt by an employer to remedy past discrimination by entering a settlement agreement not only successfully meets the challenge of a prima facie case but is not an independent discriminatory act against employees not parties to the agreement but adversely affected by it. Any other decision would discourage settlement and hamper employers in their attempts to redress past discrimination.
>
> . . .

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'This Court has noted previously that some latitude should be given to courts and employers attempting to correct past acts of discrimination. "The law is well settled that relief under Title VII cannot be denied simply because the interests of some employees will be negatively affected. . . ." Rather, "[a]dequate protection of . . . rights under Title VII may necessitate . . . some adjustment of the rights of . . . [other] employees. The Court must be free to deal equitably with conflicting interests of . . . employees in order to shape remedies that will most effectively protect and redress the rights of the . . . victims of discrimination." '

. . .

'Finally, the plaintiff attempts to rely on the Supreme Court's decision in *Regents of the University of California v. Bakke* [438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978)] to make out his claim of reverse discrimination. The *Bakke* case dealt with an affirmative action program that set aside a specific number of positions for African-Americans. Thus, applicants who were not African-Americans were wholly precluded from competing for those positions, solely on the basis of race.

> The case before us is distinguishable from the *Bakke* decision: here Marcantel was not precluded from applying 'for the Highway Maintenance Superintendent position because he was not a member of a specified race. All potential applicants were affected regardless of their race.'
>
> 37 F.3d at 201-202 (citations and footnotes omitted)."

887 F. Supp. at 1488-89 n.21. In its *Sims* opinion, the court then concluded with this observation: "Therefore, the more narrow the scope of the settlement and the more limited its impact on third parties, the more easily the settlement should pass a strict scrutiny analysis; and, conversely, the broader the scope and the greater the impact, the more difficult it may be for a settlement to pass strict scrutiny. The difference, for the purpose of strict scrutiny, between the proposed settlement now before this court and those before the courts in *Marcantel*, *Carey*, and *McCall* may be evidenced not by a bright line but by a continuum." *Id.*

This analysis from *Sims* posits that in a sense all settlements of discriminatory claims which provide relief targeted to a person of one classification and not another are subject to essentially increasing degrees of scrutiny depending upon the impact on others. Here, under this analysis, because the scope of ¶ 4 is narrow and the impact on third parties is limited, the relief is appropriate.

Accordingly, it is ORDERED:

(1) The objections made by the defendants and the Adams intervenors to ¶ 4 of article XIII of consent decree II are overruled.

(2) Paragraph 4 of article XIII of consent decree II is approved and adopted by the court.

(3) Defendants Alabama Department of Transportation and State Personnel Department and their officers, agents, servants, employees, and those persons in active participation with them who receive actual notice of this order, are each ENJOINED and RESTRAINED from failing forthwith to implement ¶ 4 of article XIII of consent decree II.

The clerk of the court is DIRECTED to issue a writ of injunction.

The clerk of the court is DIRECTED to provide for service of this injunction upon defendants Alabama Department of Transportation, Alabama State Personnel Department, and Halycon Ballard, Jimmy Butts by certified mail, returned receipt requested.

DONE this the 23rd day of January, 1998.

s/ Myron H. Thompson
UNITED STATES DISTRICT
JUDGE

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 27, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-6102-HH

JOHNNY REYNOLDS, individually and on behalf of himself and as representative of a class of black employees of the Highway Department, State of Alabama, similarly situated,

Plaintiff-Appellee,

WILLIAM ADAMS; CHERYL CAINE; TIM COLQUITT; WILLIAM FLOWERS;et al.,

Intervenors-Plaintiffs-Appellants,

versus

JIM BUTTS, in his official capacity as Director of the Alabama Department of Transportation; HALYCON VANCE BALLARD, individually and as Director of Personnel Department, State of Alabama;et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Alabama

Appendix C

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: TJOFLAT and HULL, Circuit Judges, and PROPST*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

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*Honorable Robert B. Propst, U.S. District Judge for the Northern District of Alabama, sitting by designation.

APPENDIX D — JOINT STIPULATION AND MOTION DATED NOVEMBER 18, 1993 WITH EXCERPTS FROM ATTACHED CONSENT DECREE

IN THE
UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NUMBER:
CV-85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

CECIL PARKER, et al.,

Plaintiffs-Intervenors,

v.

ALABAMA HIGHWAY DEPARTMENT, et al.,

Defendants.

JOINT STIPULATION AND MOTION

Come now the parties and jointly stipulate that they have reached a settlement in the form of the attached Consent Decree and jointly move the Court to give preliminary approval to the proposed Consent Decree attached hereto, subject to the giving of notice regarding such proposed

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Consent Decree and a fairness hearing on such proposed Consent Decree.

This the 18th day of November, 1993.

s/ Robert L. Wiggins, Jr.
s/ Claudia H. Pearson
ATTORNEYS FOR PLAINTIFFS

s/ William F. Gardner
s/ Patrick H. Sims
ATTORNEYS FOR DEFENDANTS

Appendix D

IN THE
UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO.
85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

CECIL PARKER, et al.,

Plaintiffs-Intervenors,

v.

ALABAMA HIGHWAY DEPARTMENT, et al.,

Defendants.

CONSENT DECREE

This lawsuit was filed under Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 1981 and § 1983 alleging racial discrimination in employment. The case has been certified and maintained as a class action on behalf of the following:

A. All black merit system employees employed by the Alabama Highway Department at any time since May 21, 1979, with said class represented by plaintiffs Johnny Reynolds, Ouida Maxwell, and Martha Ann Boleware; and

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[2] B. All black non-merit system employees of the Alabama Highway Department and all black non-employees who have unsuccessfully sought employment as merit system employees with the Alabama Highway Department at any time since May 21, 1979, with said class represented by plaintiffs Peggy Vonsherrie Allen and Jeffrey Brown.

A recess in the trial of the case for the purpose of settlement negotiations has resulted in the Consent Decree which follows. The following terms and provisions of this Consent Decree are accordingly agreed to in final and complete resolution of all class issues which have been asserted in the case, subject to the provisions of this Decree providing for further proceedings, including but not limited to Articles 20 and 21.

* * *

[59] ARTICLE THIRTEEN
ENGINEERING JOB CLASSES

1. Limit on the use of EIT status:

(a) On and after the effective date of the Consent Decree, EIT status and any associated tests will not be utilized as a prerequisite for the job of GCE.

(b) After the goals provided by the Consent Decree for the GCE job have been achieved, then in evaluating eligibles certified to it for the GCE job, the Highway Department may consider EIT status as a factor in the selection process but may not appoint a white applicant in preference to a black applicant based solely on EIT status.

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(c) Personnel will not utilize the EIT for scoring, ranking or certifying applicants for the position of GCE.

2. GCE job:

(a) The position of GCE will not be reduced in status, pay or importance from what it has been in the past.

(b) The GCE job will continue to be used as the entry level job for the PCE line of progression.

(c) The GCE job will also be expanded to an advanced entry level position for the CE line of progression.

[60] (d) The number of GCE's during the term of the Consent Decree will not be less than the average number per year of GCE's between January 1, 1983 and January 1, 1993.

3. State registration:

(a) Certification by the State Board of Registration as a Registered Professional Civil Engineer will continue to be a prerequisite for the PCE and GRE jobs. It will not be a prerequisite for any CE or GCE job.

(b) The PCE job will not be used excessively by the Highway Department in the assignment of employees to the in-house job titles which have been filled by both employees in the PCE job and in the CE job.

(c) The Highway Department will not make appointments from PCE Registers or use the PCE job as the source for assignments for in-house job titles for the purpose of avoiding compliance with any provision of this Decree.

(d) In the case of Highway employees who have taken but failed to pass the State Board examination for Registered Professional Civil Engineer or who are eligible to take such State Board examination, Highway will develop a special training program aimed at preparing them to take or retake the State Board examination.

4. Offers of reclassification of incumbent employees to GCE: Black persons (a) who are employed as of the effective date of the Settlement Decree with the Highway Department in jobs other [61] than PCE, GRE, or GCE, and (b) have a degree in Civil Engineering or Civil Engineering Technology will, within 90 days following the effective date of the Settlement Decree, be offered reclassification to the GCE job.

5. Offers of employment in the GCE job:

(a) The following persons (if they have Civil Engineering or Civil Engineering Technology degrees) will be offered employment in the GCE job or in the job they would now hold with the Highway Department in the absence of the EIT and associated requirements (including the recency of degree requirement), whichever is higher, with the following credited service dates:

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	CREDITED SERVICE DATE
Alfedo Acoff	March 30, 1983
Peggy Vonsherrie Allen	March 30, 1983
Christopher Zaubuike	March 30, 1983
Jeffery W. Brown	March 30, 1983
Willie F. Franklin	March 30, 1983
Macon Hinton	March 30, 1983
Wayne M. Leonard	March 30, 1983
Ronald D. Newsome	March 30, 1983
Adenrele Odutola	March 30, 1983
Rickey Richardson	March 30, 1983

(b) Up to a maximum of 10 persons, plus one replacement for each person named in Paragraph 5(a) who is not [62] appointed for any reason, black persons (if they have Civil Engineering or Civil Engineering Technology degrees) will (subject to availability) be appointed to the GCE job or the job they would now hold with the Highway Department in the absence of the EIT and associated requirements (including the recency of degree requirement), whichever is higher, provided that they satisfy the following conditions:

(i) They applied during the period since the EIT requirement was adopted for the GCE job or they would have applied for the GCE job but for the EIT requirement, and

(ii) They were or would have been rejected because of not having EIT status, or other associated characteristics (including, but not

limited to passing the FOE test and satisfying the recency of degree requirement) and

(iii) They had degrees in Civil Engineering and Civil Engineering Technology at the time they applied or would have applied, and

(iv) They would have been certified-out for GCE in the absence of their rejection for lack of EIT status or other associated characteristics as defined above.

(c) The credited service date of such of the persons specified in Paragraph 5(b) above as accept such offers [63] will be agreed to by the parties before notice of the offer of employment is given to them, subject to the following:

(i) No such credited service date shall be earlier than March 30, 1983.

(ii) The standard for determining such service dates will be the approximate date each such person would have been appointed in the absence of the EIT and associated requirements

(d) The maximum number of persons provided for by Paragraph 5(a) and Paragraph 5(b) together is 20.

(e) The State Personnel Department agrees to accept the appointment by the State Highway Department of such persons named or specified in Paragraphs 5(a) and 5(b) above as accept such offer, notwithstanding the inconsistency of such appointment (if any) with the Alabama Merit System Act.

(f) Appointments pursuant to this Article will be counted toward the goals provided for by Article Eleven and by Article Twelve above.

6. Jobs for appointments pursuant to Paragraph 5:

The job or jobs which the persons to be appointed pursuant to Paragraph 5 will be offered will be agreed to by the parties before notice of the offer of employment is given to them, subject to the following:

(a) For such persons as have a registration with the Alabama State Board of Registration as a Registered Professional Civil Engineer as of the effective date of this [64] Decree, the job to be offered will not be lower than GRE or higher than PCE-2.

(b) For such persons as do not have such registration, the job to be offered will not be lower than GCE or higher than CE-5.

7. Mechanics for the Paragraph 5 offers:

(a) Within 45 days following the effective date of this Decree and agreement on the job or jobs to be offered, the Highway Department will offer appointments to each of the persons named in Paragraph 5(a) above.

(b) The offers of employment provided for herein will be made by United States mail, addressed to the last known addresses of the persons listed in Paragraph 5(a) above (a) as set forth in the records of the State Personnel Department or (b) as provided to the State Highway Department and the

State Personnel Department by the attorneys for the plaintiffs based on any search or research they may wish to engage in to locate such persons provided any address or address is to be provided to the State Highway Department and the State Personnel Department within forty (40) days following the effective date of this Settlement Decree and agreement on the job or jobs to be offered. There will be no responsibility on any defendant to locate or to attempt to locate any of such persons.

(c) Such offers of appointment will include a designation for the use of such persons in accepting or declining the offers. There will be no option other than the options of [65] accepting the offer or declining the offer. The offers must be accepted within such thirty (30) days following the mailing of the offers. Anyone who does not respond to the offer within such 30 day period will be deemed to have declined the offer.

(d) The offers of appointments provided for herein will remain open for a period of thirty (30) days following the mailing of the offers. Any and all offers of employment not accepted in writing by the offeree shall expire and have no further force or effect following such thirty (30) day period.

(e) Such of the persons named in Paragraph 5(a) of this Article as accept the offers of employment and are employed at the State Highway Department pursuant to Paragraph 5 of this Article will be credited with employment date service as of March 30, 1983 for purposes of their starting salary level in the job. It is the intention of this provision that such of the persons named in Paragraph 5(a) as are appointed pursuant to Paragraph 5 of this Article of the Settlement

Decree will have their starting salary upon such employment equal to the average of the current salaries of the persons in the Graduate Civil Engineer job who started in such job on or about March 30, 1983.

(f) The employment of any of such persons named in Paragraph 5(a) above shall not result in the displacement of anyone from any job, position, assignment, location, or shift and shall not result in the displacement of anyone from any section or bureau or division or district or office.

[66] *8. Notice to recruitment sources*: The Highway Department will notify all recruitment sources, including colleges with Civil Engineering and Civil Engineering Technology programs at which the Highway Department recruits for Engineers, that EIT status, associated tests, and the recency of degree requirement has been discontinued as a prerequisite for the GCE job.

9. Newspaper notice: The Highway Department will place a notice advising that EIT status and associated characteristics, including the FOE test and the recency of degree requirement, has been discontinued as a prerequisite for the GCE job in newspapers of general circulation and special circulation in black communities and will otherwise adequately publicize such changes in the electronic media in the following cities:

— Montgomery
— Birmingham
— Mobile
— Tuscaloosa

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— Auburn
— Huntsville
— Dothan
— Tri-Cities Area
— Gadsden
— Anniston
— Alexander City
— Troy
— Grove Hill

[67] Such notices and publicity shall invite black engineers to apply for employment with the SHD through the SPD. Notices and publicity in the print media shall consist at, a minimum, of quarter 1/8 page advertisements designed to reach the maximum number of readers. Notices and publicity in the electronic media will be designed and placed in the most advantageous manner for achieving the attention of the public.

10. Notice to applicants for GCE rejected because of the EIT requirement:

> (a) To the extent it is able to do so, the Personnel Department will provide to the Highway Department the names and last known addresses for all black persons with degrees in Civil Engineering and Civil Engineering Technology who applied for the GCE job and were rejected because of not having EIT status or any associated characteristics as defined above. The Highway Department shall make reasonable

efforts to identify the names and last known addresses of all black persons with degrees in Civil Engineering and Civil Engineering Technology from the colleges and universities which it will recruit under the terms of this Consent Decree.

(b) The Highway Department will in turn give notice to such persons by certified mail, addressed to them at their last known address, advising them of the discontinuance of EIT status and associated characteristics as a prerequisite for the GCE job and [68] enclosing a blank application form so they can if they wish reapply with Personnel for the GCE job.

(c) Those who reapply and are certified-out by the Personnel Department to the Highway Department for the GCE job will be offered employment by the Highway Department in the GCE job, assuming they satisfy the qualification standards of the job and, if they did not apply for the GCE job in the past, can show a reasonable probability that they would have applied in the absence of the EIT or associated requirements, including, but not limited to, the FOE exam and the recency of degree requirement.

(d) Those not offered employment and hired in accordance with Paragraph (c) above would remain on the register under the conditions of the Register Purging provisions above.

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11. Age Restrictions: The defendants will not utilize any criteria or selection procedure in relation to black applicants which has the purpose or effect of preferring scoring, ranking or restricting eligibility of black applicants because of the date of their education, their age or any other item related to time or age which may perpetuate past patterns of underutilization of black applicants.

* * *

[79] ARTICLE NINETEEN
GENERAL

* * *

[84] * * *

15. The goals and remedies provided for by this Decree, including, but not limited to, the goals and appointments provided for by Articles Eleven, Twelve, and Thirteen, have been fashioned so as to be in full compliance with the factors applied in evaluating "race conscious" remedies, including the compelling interest of the defendants in providing equality of employment opportunity, the imbalance in certain jobs, the tailoring of the goals to the minimum necessary, the fact that the goals provided for by this Decree are of temporary duration, and the conclusion that nothing in this Decree unnecessarily trammels the rights of white applicants or employees.

* * * *

APPENDIX E — ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION DATED AND FILED NOVEMBER 19, 1993

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

CIVIL ACTION NO. 85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

PERRY HAND, et al.,

Defendants.

ORDER

Upon consideration of the joint stipulation and motion for approval of proposed consent decree, filed on November 18, 1993, it is ORDERED that the motion is granted to the following extent:

(1) That the proposed consent decree is preliminarily approved;

(2) That a hearing on the proposed consent decree is set for January 19, 1994, at 1:30 p.m. in the second floor

courtroom of the Frank M. Johnson, Jr., Federal Building and United States Courthouse in Montgomery, Alabama;

(3) That the parties are to submit to the court by December 1, 1993, a proposed notice to the class; and

(4) That said notice shall include a January 14, 1994, deadline for filing objections.

DONE, this the 19th day of November, 1993.

s/ Myron H. Thompson
UNITED STATES DISTRICT
JUDGE

APPENDIX F — NOTICE OF PROPOSED DECREE, OPPORTUNITY TO OBJECT, AND HEARING DATED DECEMBER 10, 1993

**IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

**CIVIL ACTION NO.
85-T-665-N**

JOHNNY REYNOLDS, et al.,

Plaintiffs,

CECIL PARKER, et al.,

Plaintiffs-Intervenors,

v.

ALABAMA HIGHWAY DEPARTMENT, et al.

Defendants.

NOTICE OF PROPOSED DECREE, OPPORTUNITY TO OBJECT, AND HEARING

ALL EMPLOYEES AND EX-EMPLOYEES OF THE ALABAMA HIGHWAY DEPARTMENT AND ALL APPLICANTS AND WOULD-BE APPLICANTS FOR EMPLOYMENT WITH THE ALABAMA HIGHWAY DEPARTMENT

Appendix F

THIS NOTICE IS BEING GIVEN TO YOU PURSUANT TO AN ORDER ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA AND SECTION 108 OF THE CIVIL RIGHTS ACT OF 1991. IT IS IMPORTANT THAT YOU READ IT CAREFULLY.

A. GENERAL:

1. The purpose of this Notice is to provide you with the following information:

a. This lawsuit was filed as a class action, alleging racial discrimination in employment opportunities by the Alabama Highway Department (now known as the Alabama Department of Transportation) and the Alabama Personnel Department.

b. A classwide settlement of this lawsuit has been proposed by the parties for approval by United States District Judge Myron H. Thompson;

c. The terms of the proposed settlement are summarized in Section D of this Notice and you should read that summary carefully to determine if such terms might affect your employment rights and interests;

d. If more information is needed about the proposed settlement to determine whether you are affected by it, the means for obtaining additional information is set forth in Section E of this Notice;

e. To have questions answered, or obtain more information, you may also attend meetings to be held by the attorneys for the class throughout various cities in Alabama during the week of January 10, 1994 at the times and places listed in Section F of this Notice.

f. You have the opportunity to object or comment on the proposed settlement by filing a written statement of the grounds for such objection or comments on or before JANUARY 14, 1994 in accordance with the directions set forth in Section G of this Notice.

g. You have the opportunity to attend a hearing which will be held by the Court at 1:30 p.m. on JANUARY 19, 1994, at the federal court in Montgomery, Alabama, at which time the Court will hear evidence and comments on whether the Consent Decree is fair, adequate, and reasonable and whether it should be approved.

B. DEFINITION OF WHO IS INCLUDED IN THE CLASS:

2. The case has been certified as a class action on behalf of the following:

All black merit system employees employed by the Alabama Highway Department at any time since May 21, 1979.

All black non-merit system employees of the Alabama Highway Department and all black non-employees who have unsuccessfully sought employment as merit system employees with the Alabama Highway Department at any time since May 21, 1979.

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C. NOTICE TO PERSONS WHO ARE NOT CLASS MEMBERS:

3. If you are not a member of the class — if you are, for example, a white person employed by the Alabama Highway Department — this is notice to you in accordance with Section 108 of the Civil Rights Act of 1991 that:

a. You should study the summary of the terms of the proposed Consent Decree and the Decree itself to determine whether it may adversely affect your interests and legal rights;

b. You have the same opportunities to present objections by January 14, 1994 and to attend the court hearing scheduled for January 19, 1994 , but you should comply with the requirements for doing so set forth in Section G of this Notice;

c. If the Decree is approved, you will be precluded from challenging or contesting the Decree and any employment practice that implements and is within the scope of the Decree in the future.

D. THE TERMS OF THE PROPOSED SETTLEMENT:

4. *Purpose and Scope:* The purpose of the settlement is to put into effect a set of procedures and goals which will resolve the class issues in this case at the earliest possible time so that the remedies in that phase of the case can become effective without having to await resolution of the second phase of the case involving claims of entitlement of particular class members to monetary and other individual forms of relief.

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5. *Backpay or front pay:* The proposed settlement does not include any specific amount of backpay or front pay at this stage of the case, but instead provides for a set of procedures to be followed to make a determination of claims of members of the class to such payments or other relief (such as hiring, promotion, reassignment, reclassification, retroactive seniority, etc.). The procedures to determine claims of class members to such relief (including the amount of money, if any, to be paid to them), require that further settlement negotiations regarding such claims for relief be concluded within 90 days of the effective date of the Consent Decree and, in the absence of such a further settlement, for trial to commence on such claims within 180 days of the effective date. The proposed Consent Decree, by itself, does not guarantee that any particular member of the class will be entitled to backpay or front pay, but it also does not limit the amount of such relief to which any class member may be entitled in the future proceedings to be held on that phase of the case.

6. *Summary of The New Procedures and Goals:* The procedures and goals set forth in the proposed Consent Decree will govern the recruitment, screening, examination, appointment, and reclassification of Highway Department employees and applicants. This Summary is not intended to be and should not be used as an interpretation of the Decree. Only the Decree itself may be used for the meaning of the provisions of the Decree. You should consult the Decree for any question regarding the meaning of the settlement. The purpose of this summary is to provide you with general information so you can determine the extent to which the Decree would affect your interests and legal rights and have an understanding of the Decree. The procedures and goals

set forth in the proposed Decree address the claims in this case in the following ways:

a. *Recruitment:* In regard to the claim that the Highway and Personnel Departments have used recruitment or job announcement procedures which have the purpose or effect of favoring white applicants or employees or perpetuating past racial discrimination, the proposed Decree strengthens the intensified recruitment obligations imposed by the federal court in *United States v. Frazer* in 1976 by requiring recruiting of all black persons enrolled in an expanded list of educational programs and institutions and by providing monetary and other incentives to be used in such recruiting efforts.

b. *Job Announcements And Minimum Qualifications:* In regard to the claim that the Minimum Qualifications in the Job Announcements and screening procedures used by the Personnel Department are racially discriminatory because they favor characteristics more often possessed by white persons as a result of past discrimination, the proposed Decree requires that such Minimum Qualifications be demonstrated to have a manifest relationship to the skills necessary to perform the job and that they include only skills that are not already addressed in other parts of the examination process. The proposed Decree also requires that the Minimum Qualifications be validated in accordance with the Guidelines of the EEOC and the United States Department of Justice within two years of the effective date of the Decree and that the existing Minimum Qualifications and Examinations for certain critical job

classes will not be used during that period. Job Announcements must also be redesigned to let prospective applicants know the information with which they are expected to be familiar on the examinations and the characteristics that will be assessed in the examination process.

c. *Examinations*: In regard to the claim that the examinations used to score and rank applicants discriminate against black eligibles who have satisfied the Minimum Qualifications, the proposed Decree requires that new examinations be shown to be valid within the meaning of the Guidelines of the EEOC and United States Department of Justice. Existing examinations and registers for certain critical job classes will be abolished. The proposed Decree further requires that: (1) banded scoring will be used to enhance the availability and appointability of black applicants; (2) written tests will not be used unless certain conditions are satisfied; (3) adequate means to measure and monitor disparate impact of examinations will be developed; (4) in-house duties and responsibilities at the Highway Department will be assigned in such a way as to assure that experience and training gained by black employees is comparable to that of white employees so that T & E examinations will have less adverse impact; (5) a policy and program be developed to prohibit and punish efforts to divulge the content of examinations or to improperly aid examinees; and (6) all efforts at validation will be fully documented. Future selection procedures or criteria cannot be more difficult or demanding than those applied to white employees in the period since January 1, 1979

unless shown to be valid within the Guidelines of the EEOC and the United States Department of Justice.

d. *Use of Registers:* In regard to the claim that Current rather than Continuous Registers have been used with the purpose and effect of discriminating on the basis of race by precluding the opportunity to apply and hampering the effect of recruitment, the proposed Decree provides that: (1) Continuous Registers will be used for the largest and most critical job classifications (defined in the Decree as the "SPD Project classes"), and for other job classifications which either have been subject to such a Register since 1979 or for which Continuous Registers would aid in the recruitment of black applicants; (2) eligibles proposed to be purged or inactivated from a Continuous Register will be given notice beforehand, class members will not be inactivated or purged if they request not to be, and the Highway Department will recruit such class members and encourage them to maintain their eligibility or to reapply; and (3) Current Registers will be abolished only after an analysis of the impact on black eligibles and the goals of the Decree, and class members on such Registers will be invited to reapply and will be placed back on the new Register if they do.

e. *Use Of Promotional Registers:* In regard to the claim that Promotional Registers have been used with the purpose or effect of perpetuating past discrimination by restricting eligibility to apply for promotion to those who have obtained certain amounts of prior experience in the next-lower job in the line of progression, the proposed Decree requires that Promotional Registers in the State Personnel Department Project Classes will

no longer be restricted in that manner and that the greatest amount of prior experience that can be required in the future is one year in the entire line of progression or equivalent experience at the level of such service (subject to certain exceptions).

f. *Certificate of Eligibles:* In regard to the claim that the composition of eligibles on Certificate of Eligibles are manipulated through the choice of Register used to form the Certificate and by delay in requesting the Certificate with the purpose and effect of discriminating on the basis of race, the proposed Decree requires that the Personnel Department form the Certificate of Eligibles from that Register which will provide the best opportunity to reach or appoint black eligibles, either by operation of the "no-passover" rule or otherwise. The proposed Decree prohibits any effort to avoid appointment of black eligibles by canceling requests for Certification, returning Certificates unfilled, abolishing Registers or Certificates, delaying requests for issuance of Certificates, or any other means. The Highway Department must request issuance of the Certificate within 30 days of the event creating an opening to be filled (with certain exceptions). The Personnel Department is also prohibited from providing the Highway Department employees with the means of learning the identities or racial compositions of Registers or Certificates of Eligibles before a Certificate is officially issued and is required to take steps to assure that information about the composition of Registers and potential Certificates are not available to or used by Highway Department employees.

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g. *Interviews:* In regard to the claim that black eligibles are not interviewed or fairly considered by the Highway Department once they appear on a Certificate of Eligibles, the proposed Decree requires that all black eligibles be interviewed unless they cannot be located, they fail to respond to a notice scheduling an interview or they fail to appear for the interview after reasonable efforts by the Highway Department to encourage their attendance. The proposed Decree further provides that the interview process be standardized so that objective nondiscriminatory information is elicited to the extent practicable. Training must also be provided to interviewers for the purpose of minimizing to the extent practicable any disadvantages to class members in the interview process. The Highway Department will to the extent practicable endeavor to include black employees among the interviews, and documentation of the job-related qualifications of all eligibles interviewed must be maintained.

h. *Appointments:* In regard to the contention that appointments have been made by the Highway Department with the purpose and effect of discriminating on the basis of race, the proposed Decree requires that the affirmative action goals provided in the Decree be utilized in making selections and that the Highway Department develop a monitoring program to assure that the purposes of the Decree are fulfilled.

i. *In-House Career Paths:* In regard to the claim that in-house job assignments and titles are awarded for the purpose and effect of discriminating on the basis of

race, the proposed Decree requires that the Highway Department develop written job descriptions of the in-house titles and designate the merit system job classification and Registers from which each such in-house job may be filled. The proposed Decree further provides that the Highway Department take affirmative steps to have eligible black employees receive assignments to the better in-house job titles. Duties and responsibilities in higher classified jobs will to the extent practicable be assigned on a proportionately equal basis to black employees compared with white employees in the jobs below such job. Duties will to the extent practicable not be assigned in such a way that any employee will gain an advantage in promotions. Those assignments and duties which better prepare employees for advancement will be listed, and a procedure will be developed to assure to the extent practicable that employees on the job are periodically rotated into such assignments and duties and that black employees are assigned to such duties and assignments at rates proportional to their representation in the job. A training program must be developed to provide interested black employees the information needed to enhance their opportunity to move up the lines of progression.

j. *Goals:* In regard to the cumulative effect of all the forms of racial discrimination that are challenged in this action, including the claim of perpetuation of the discrimination found to exist in *United States v. Frazer* in 1976, the proposed Decree provides for the use of goals in the appointment process which are aimed at the appointment of certain minimum numbers of class

members during the next seven years. The effective date of the Goals is January 1, 1994. The goals apply to jobs in which less than 33.3% of the incumbents at the start of each year are black. The goals are based on the total number of appointments to the jobs, ranging from a goal of 1 black for jobs with 1 to 2 appointments to 8 blacks for jobs with 29 to 32 appointments and defined percentages for jobs with 33 or more appointments. It should also be noted that the goals for jobs with 3 to 32 appointments call of the first appointment to be a black person. The number of appointments, which determines the goals, is based on the number of appointments in the prior or current calendar years, whichever is greater (for example, for 1994 the number of appointments will be based on the number of vacancies filled in 1993 or 1994, whichever is greater). In the event that not enough vacancies occur to achieve the purposes of the Decree, the plaintiffs have the right to petition the court to extend the duration of the goals. The Personnel Department is responsible for certifying sufficient number of eligibles on each Certificate of Eligibles to assure that an adequate number of black eligibles are available to the Highway Department to achieve the goals regardless of the "Rule of 10" or any other rule restricting the number of persons certified-out, but during the period that the Registers are abolished awaiting validation of new selection procedures and criteria appointments will be made without Certificate of Eligibles.

k. *Special Appointments In Engineering Job Classes:* In regard to the claims regarding the cumulative effect of the various forms of discrimination in the

engineering job classes, including the claim of perpetuation of the racial discrimination found to exist in *United States v. Frazer* in 1976, the proposed Decree provides for the goal of the appointment for the following number of black persons as the goal in the first year of the proposed Decree: (a) 45 Civil Engineers; (b) 3 Professional Civil Engineers; and (c) 2 Graduate Registered Engineers. All Engineering Assistants I or II who had at least 2 years service in either of such classifications before October 4, 1989 will be reclassified to Engineering Assistant III and will be paid at the rate which they would be if they had become an Engineering Assistant III on the fifth anniversary of their appointment as either an Engineer Assistant I or II. Black Graduate Civil Engineers who have served at least five years in such job classifications will be reclassified to the Civil Engineer IV position and paid in the same manner as if they became a Civil Engineer IV within five years of their appointment to Graduate Civil Engineer.

l. *EIT and License Requirements for Graduate and Professional Engineers:* In regard to the claim that the EIT certificate was used for the purpose or with the effect of discriminating on the basis of race in the appointment of Graduate Civil Engineers, the proposed Decree forbids further use of the EIT for scoring, ranking or certifying applicants (and for any other purpose until the goals of the Decree have been satisfied). The proposed Decree also requires: (1) that the GCE job will continue to be the entry level for the PCE line of progression and will be expanded to an advanced entry job for the CE line of progression; (2) all black employees who have a degree

in Civil Engineering or Civil Engineering Technology will be offered reclassification to the GCE job; (3) ten named persons who are not currently employed by the Highway Department will be offered appointment to the highest position (subject to defined conditions) they would have now occupied if they had become Graduate Civil Engineers on March 30, 1983, and be credited with service dates of March 30, 1983; (4) that 10 additional persons shall be appointed as Graduate Civil Engineers or at such higher position (subject to certain conditions) as they would have now occupied in the absence of the EIT requirement, and their credited service date will be the date they would have been first hired at the Highway Department in the absence of the EIT; (5) that all such appointments shall be made regardless of the Alabama Merit System Act; (6) that the prohibiting of further use of the EIT will be widely publicized; and (7) that persons who applied and would have been eligible (or would have applied and been eligible) in the absence of the EIT will be invited to reapply and, if certified-out, will be offered employment in the GCE job assuming they meet the qualification standards of the job. The proposed Decree permits the continued use of State certification as a Registered Professional Engineer for the PCE and GRE jobs, but forbids such requirement for all other job. The Highway and Personnel Departments will not use the PCE and GRE jobs excessively or for the purpose of avoiding compliance with the goals or other provisions of the Decree. The Highway Department must also develop a special training program aimed at preparing employees who have taken but failed the RPCE examination or who are eligible to take such examination

to take or retake the State Board examination for such certification or registration.

m. *Reclassification of Laborers:* In regard to the contention that Laborers have been precluded from movement to HMT or EA jobs because of their race, the proposed Decree requires that all Laborers with one year of service (except Seasonal Laborers), shall be reclassified to the HMT or EA position that is most similar to the duties they have performed as a Laborer on a regular basis.

n. *Reclassification Project:* In regard to the contention that the classification and reclassification of employees have been accomplished with the purpose and effect of discriminating on the basis of race and in regard to the claim of the cumulative effect of the various forms of racial discrimination challenged in this case, the proposed Decree provides that the job duties of class members will be studied by the Highway and Personnel Departments and that class members will be reclassified to any higher position in which they spend a majority of their working time or in which they spend an amount of time equal to a majority of the incumbents in such higher job classification. The Highway Department must also monitor the duties and responsibilities of employees to assure that at least 90% of their performance is within the job description for the job they are holding.

o. *Restriction On Reclassification:* In regard to the claim that reallocations have been used with the purpose of discriminating on the basis of race and avoiding black eligibles on the Registers, the proposed Decree prohibits

reallocations when there are black eligibles on the Register ranked equal or higher than the person to be reallocated or when black eligibles would appear on a COE with the person to be reallocated ranked first on such COE.

p. *Study Of Multi-Grade Jobs:* The multi-grade jobs (for example, EA, CE, PCE, HMT, etc.) will be studied and if such study discloses that existing distinctions in the levels of multi-grade jobs do not reflect actual differences in duties, the number of grades will be reduced to reflect the actual distinctions in duties, if any, which are capable of being administered in such a way that only persons in that are job classification or grade perform such duties on a regular or non-emergency basis. The purpose of the study and revision of multi-grade jobs is to better the job opportunities of black employees and the restructuring of jobs will be implemented to achieve this purpose. Class members will not be downgraded or have their pay reduced as a result of the restructuring unless they are incapable of performing the new job after reasonable training.

q. *Training:* In regard to the claim that the merit system and the in-house titles have been operated in a manner which discourages applications and other efforts by otherwise interested class members, the proposed Decree requires a special affirmative action training program aimed at assisting black employees in progressing in career paths within the Highway Department and requires that efforts be made to assure to the extent practicable that interested black employees receive their fair share of other training.

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r. *Racial Harassment:* In regard to the contention that racial harassment has gone unaddressed at the Highway Department, the proposed Decree provides that the policy against such harassment implemented at the direction of the Court during the trial of this action in October, 1992 remain in effect and that training aimed at eliminating such harassment will be provided to all employees.

s. *Appointment Of Relatives:* In regard to the claim that relatives have been favored in various employment opportunities and that this has been done with the purpose or effect of discriminating on the basis of race, the proposed Decree requires the Highway Department to take steps to eliminate any such preferences or favoritism and to monitor this issue.

t. *Monitoring Of Compliance And Further Relief:* In regard to the claim of cumulative effect of all of the forms of racial discrimination challenged in this lawsuit and to assure that the Decree achieves the intended purpose for which it is entered, the Decree provides that: (1) the Highway and Personnel Departments must provide to the attorney for the class various reports and records necessary to monitor compliance; (2) that such attorney will be consulted in developing new selection procedures and criteria; (3) that he will have the right to challenge compliance with the Decree in this case and will have the right to seek further relief from the court if the Decree fails to achieve the purposes for which it was entered; and (4) that an improved complaint procedure will be agreed upon and implemented aimed at

encouraging the filing and resolution of charges of discrimination or retaliation in-house at the Highway Department.

u. *Effective Date And Length Of Decree:* The effective date of the Decree is 35 days following approval by the District Court, except for the Goals section which is retroactive to January 1, 1994. The duration of the Decree is until December 31, 2000, or such later date as extended by the Court. There will be no appeal from any ruling, order or decision by the District Court.

v. *Attorneys's Fees:* The plaintiffs' attorneys are to be paid a reasonable fee for time expended and expenses incurred in representing the named plaintiffs and the class in this action. The amount of such award has not yet been negotiated and, in the absence of an agreement between the parties, the amount will be determined by the Court. The amount of such fees and expenses will not affect, or be effected by, any monetary relief which may be awarded to the class or the named plaintiffs.

E. HOW TO OBTAIN FURTHER INFORMATION:

7. If there is anything in the proposed Decree or in this notice which you do not fully understand, you are urged to obtain assistance in understanding the proposed Decree or this notice, or both.

8. You should review the provisions of the proposed Decree for a full understanding of the meaning and effect of the Decree. You may obtain a copy of the proposed Decree without cost by contacting the following:

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Central Office Personnel Bureau
Alabama Highway Department
1409 Coliseum Boulevard
Montgomery, Alabama 36130-3050
Telephone: 1-800-290-4119

F. *MEETINGS WITH THE ATTORNEY FOR THE CLASS:*

9. If you have questions or concerns about the Proposed Settlement or how it may affect your own interests, you may attend one or more of the meetings with the attorney for the class who negotiated the proposed Decree. These meetings are being held at the following dates, times and places:

Mobile: Monday, January 10, 1994
(6:00-8:00 p.m.)
Bishop State Community College
Student Life Center —
O.H. Delchamps Theater
351 Broad Street
Mobile, Alabama 36603

Dothan: Tuesday, January 11, 1994
(4:30-6:30 p.m.)
Westgate Park Community Center
517 Westgate Parkway
Dothan, Alabama 36303

Montgomery: Wednesday, January 12, 1994
(5:00-7:00 p.m.)
Governor's House Hotel
2705 East South Boulevard
Montgomery, Alabama

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Huntsville: Thursday, January 13, 1994
(5:00-7:00 p.m.)
Huntsville Public Library
915 Monroe Street
Huntsville, Alabama 35801
(Main Library Auditorium)

Birmingham: Friday, January 14, 1994
(5:00-7:00 p.m.)
SouthTrust Auditorium
420 20th Street North
Eighth Floor
Birmingham, Alabama 35203

10. If you are a member of the class, you may contact the attorney for the class, who is Robert L. Wiggins, Jr., Gordon, Silberman, Wiggins & Childs, 1400 SouthTrust Tower, Birmingham, Alabama 35203, telephone (205) 254-1521.

G. HOW AND WHEN TO FILE AN OBJECTION:

If you have no objection to the proposed settlement you need take no action in response to this Notice. If, however, you object to the terms of the proposed settlement, you should follow the following procedures:

11. Regardless of whether you are or are not a member of the class, you have the right to file any objection to the proposed Decree or to any provision or aspect of the proposed Decree. For example —

a. If you are a member of the class and believe that the proposed Decree would not be adequate, you have the right to express your opinion by objecting to it.

b. If you are not a member of the class and believe that the proposed Decree would adversely affect you, you have the right to express your opinion by objecting to it.

12. Any objection, question, or comment you may have — whether in favor of or in opposition to the proposed Decree — should be expressed by you by the following steps:

a. Any objection, question, or comment you might have must be made known to the Court in writing in advance of the fairness hearing by being mailed on or taken to the Office of the Clerk of the Court so as to be received on or before **JANUARY 14, 1994**. The address of the Office of the Clerk is as follows:

Office of the Clerk
United States District Court
Frank M. Johnson, Jr. Federal Building
and United States Courthouse
15 Lee Street
Montgomery, Alabama 36102

b. Any such written objection, question or comment must be mailed or delivered to the Office of the Clerk should refer to the name and number of this case as *Reynolds, et al. v. Alabama Highway Department, et al.*, Civil Action No. 85-T-665-N, and should state your name

and reason or reasons for your objection. Your address and telephone number should also be stated.

c. Any paper you file with the Court should state whether it is an objection to the settlement or whether it is a question or comment that should not be considered as an objection. If your paper is to be considered an objection, it should explain, in as much detail as you can provide, the reason for your objection, the part of the Decree you object to, and what change to the Decree would be necessary for you to approve it, if any.

d. You will not be permitted to voice objection to the proposed Consent Decree at the court hearing on January 19, 1994 unless you have complied with the deadline and other requirements set forth above.

H. *COURT HEARING ON APPROVAL OF PROPOSED SETTLEMENT:*

13. The Court will not make a ruling on approving or disapproving the proposed Consent Decree until after a fairness hearing has been held to consider any objections by any member of the class or by any non-member of the class and to consider the fairness, reasonableness, and adequacy of the proposed Consent Decree.

14. The fairness hearing will be held before the Honorable Myron H. Thompson, Chief United States District Judge, at the following day, time, and place:

Appendix F

PLACE: United States District Court
2nd Floor Courtroom
Frank M. Johnson, Jr. Federal Building
and United States Courthouse
15 Lee Street
Montgomery, Alabama

DATE: Wednesday, January 19, 1994

TIME: 1:30 P.M.

The hearing will be open to the public, and whether you are or are not a member of the class, you have the right to attend the hearing.

/S/ THOMAS C. CAVER
THOMAS C. CAVER
CLERK, UNITED STATES
DISTRICT COURT
FRANK M. JOHNSON, JR.
FEDERAL BUILDING
AND UNITED STATES
COURTHOUSE
15 LEE STREET
MONTGOMERY, ALABAMA 36102

APPENDIX G — ORDER OF THE DISTRICT COURT OF UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION DATED AND FILED FEBRUARY 9, 1994

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

CIVIL ACTION NO. 85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

GARY MACK ROBERTS, et al.,

Defendants.

ORDER

In this lawsuit, plaintiffs, a class of African-American merit system employees and unsuccessful applicants, charge defendants, the Alabama Department of Transportation (formerly known as the Alabama Highway Department), the Alabama State Personnel Department, and several state officials, with race discrimination. Plaintiffs rest their lawsuit on Title VII of the Civil Rights Act of 1964, as amended, codified at 42 U.S.C.A. §§ 1981a, 2000e through 2000e-17; the fourteenth amendment to the United States Constitution, as enforced by 42 U.S.C.A. § 1983; and 42 U.S.C.A. § 1981. In 1988, the parties reached a full settlement of this case but

the court refused to approve the proposed consent decree in the face of numerous objections from the members of the plaintiff class. *Reynolds v. King*, 790 F. Supp. 1101 (M.D. Ala. 1990). In 1993, after a partial trial which lasted several months, the parties reached a second, albeit only partial, settlement, subsequently embodied in a new proposed consent decree, the approval of which is currently under the court's consideration. The new proposed decree provides for only systemic class relief; trial will proceed on the claims of individual class members that are not later resolved.

This case is now before the court on four motions relating to the proposed consent decree: a motion for appointment of counsel filed by the Transportation Department and three motions — to intervene, for confirmation of counsel, and for an order requiring payment of fees and expenses — filed by several "non-class-member employees," that is, persons who are employees of the Transportation Department but who are not members of the plaintiff class of African-Americans.[1] For the reasons set forth below, the motions for appointment and confirmation of counsel and payment of fees and expenses will be denied, and the motion to intervene will be granted.

I. MOTIONS FOR COUNSEL

A. *Appointment and Confirmation*

Upon receiving notice of the proposed consent decree in December 1993, certain non-class-member employees of

1. These non-class-member employees predominantly consist of white employees of the Department.

the Transportation Department sought legal counsel to represent their objections to the decree; they contacted and retained attorneys David P. Whiteside, Jr., and Raymond P. Fitzpatrick, Jr. Meetings were then held on January 6 and 10, 1994, with large numbers of non-class-member employees present; it was agreed that Whiteside and Fitzpatrick should represent their interests and a steering committee was elected. The Transportation Department then agreed voluntarily to pay counsel fees and expenses for those persons who are not members of the plaintiff class, and later moved the court for an order appointing Whiteside and Fitzpatrick as counsel for all non-class members. Whiteside and Fitzpatrick supported this motion, with the exception that they would represent only those persons who are employees of the Department and who are not members of the plaintiff class; in other words, they would not represent non-class members who are not employees of the Department. Whiteside and Fitzpatrick also filed their own motion for "confirmation" of group representation. The plaintiffs oppose the appointment and confirmation of counsel.

The court is not entirely certain on what basis the Transportation Department and the non-class-member employees seek to have counsel appointed or confirmed. There appears to be no invocation of the *in forma pauperis* procedures available to seek appointment of counsel. *See, e.g.*, 28 U.S.C.A. § 1915(d) (general allowance for appointment of counsel by court for indigent litigants). The Department and the non-class-member employees argue essentially that appointment is necessary because "the right to notice and the opportunity to be heard provided by Section 108 of the 1991 Civil Rights Act could be jeopardized if

non-class members are not extended the right to be heard through counsel."[2] The court finds this argument unpersuasive.

Section 108 of the Civil Rights Act of 1991, 42 U.S.C.A. § 2000e-2(n), provides that a consent decree resolving a claim of employment discrimination will be binding against all persons, including non-class members adversely affected, who had notice and a reasonable opportunity to present objections.[3] This section in no way indicates that the

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2. Transportation Department's Motion for Appointment of Counsel, at 2-3.

3. 42 U.S.C.A. § 2000e-2(n)(1) provides, in relevant part:

> "(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).
>
> (B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws —
>
> (i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had —
>
> (I) actual notice of the proposed judgment or order sufficient to apprise such person that

(Cont'd)

opportunity to present objections is reasonable only when the objectors are represented by court-appointed counsel. The conclusory assertion by the Transportation Department and the non-class-member employees, without citation of any supporting legal authority, is of no help to the court in determining why appointment or confirmation of counsel is necessary to comply with section 108 as contemplated by the drafters of the Civil Rights Act of 1991.

Title VII does contain a provision for appointment of counsel "Upon application by the complainant and in such circumstances as the court may deem just . . . ." 42 U.S.C.A. § 2000e-5(f)(1). Although the Transportation Department and the non-class-member employees have not invoked this provision, the court has considered it and declines to exercise its discretion to appoint counsel under these circumstances. Assuming that the non-class-member employees could be characterized as "complainants," the Eleventh Circuit Court of Appeals has held that there is "no automatic right to appointed counsel" under § 2000e-5(f)(1). *Hunter v. Department of the Air Force Agency*, 846 F.2d 1314, 1317 (11th Cir. 1988) (per curiam). Rather, this decision is within the discretion of the district court. *Id.* In determining whether

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(Cont'd)

> such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and
>
> (II) a reasonable opportunity to present objections to such judgment or order; . . . ."

to appoint counsel under this provision, a trial court is to consider "the merits of the plaintiff's claim, the plaintiff's efforts to obtain counsel, and the plaintiff's financial inability to retain counsel." *Luna v. Intern. Ass'n of Machinists and Aerospace Workers Local # 36*, 614 F.2d 529, 531 (5th Cir. 1980).[4] Assuming that the non-class-member employees' action has merit, the court's consideration of the second and third factors leads to the conclusion that counsel should not be appointed. The non-class-member employees have sought and successfully retained counsel and the Transportation Department has agreed to pay counsel's fees. Counsel for the non-class-member employees have since filed: a notice of appearance, the motions currently before the court, and a statement of objections on behalf of their clients; they have also represented the interests of the non-class-member employees at a fairness hearing held on January 19, 1994, and they continue to represent those interests in post-hearing negotiations. The court finds no reason to conclude that its order, sanction, appointment, or confirmation of counsel's representation of their clients is warranted; the motions for appointment and confirmation will therefore be denied.[5]

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4. In *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

5. Admittedly, in the case of *United States v. City of Montgomery*, C.A. No. 3739-N (M.D. Ala. Feb. 3, 1988) (Thompson, J.), in which a police department was found liable for discrimination against its African-American and female employees, this court appointed counsel to represent the interests of white male police officers. In that case, however, all parties agreed to the appointment.

B. *Fees and Expenses*

The non-class-member employees also move the court to direct the Transportation Department to pay their reasonable fees and expenses. In support of their motion, they state, first, that the Department has consented to the payment of their fees and expenses and, second, that the law justifies such an order because the non-class-member employees should be "treated as civil rights plaintiffs." The first argument is easily rejected. The fact that the Transportation Department has consented to pay for counsel's fees and expenses is not a legal basis for the court to order such payment.

The second argument raised by counsel for the non-class employees convinces the court that their motion is, at best, premature. Parties to a Title VII action — the status sought by non-class-member employees in their motion to intervene — may be allowed attorneys' fees upon a showing that they have "prevailed" as complainants. 42 U.S.C.A. § 2000e-5(k).[6] In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), the Supreme Court explained that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing

6. 42 U.S.C.A. § 2000e-5(k) provides, in relevant part:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs . . . ."

the suit." *Id.* at 433, 103 S.Ct. at 1939 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). Because counsel has only begun to represent the non-class-member employees, it is too soon to determine whether counsel will prevail on any significant issue.

The non-class-member employees rely on *Afro-American Patrolmen's League v. Atlanta*, 817 F.2d 719 (11th Cir. 1987), to support their argument that they are entitled to an order of payment. This case, however, supports rather than contradicts the court's conclusion that fees and expenses are not due to be awarded unless the non-class-member employees prevail. In that case, where non-minority plaintiff-intervenors alleged reverse discrimination, the court held that, "By prevailing on the contempt motion and achieving a consent agreement resolving the issue of promotions, the [plaintiff-intervenors] prevailed to the extent necessary for an award of attorneys' fees pursuant to Title VII." *Id.* at 725. Because the non-class-member employees have yet to prevail on any issues before the court in its consideration of the proposed consent decree, the court will not order the Transportation Department to pay their fees and expenses at this time.

The plaintiffs, in opposing the motion for payment of fees and expenses for non-class-member employees' counsel, argue that the court should enjoin even the voluntary payment of attorneys' fees and expenses by the Transportation Department because such payment would violate Title VII and the equal protection clause of the fourteenth amendment. They argue that counsel must be provided, if at all, on a non-discriminatory basis. Admittedly, although the Transportation Department has voluntarily agreed, in Article 21 of the

proposed consent decree, to pay plaintiffs' attorneys' fees, the Department agreed only after plaintiffs, who are African-Americans, had suffered years of litigation, including several months of actual trial, and only if plaintiffs should prevail by securing the court's approval of the proposed consent decree; in contrast, the Department agreed almost immediately, even without the non-class-members having actually prevailed on any issue, to pay attorneys' fees and expenses for this predominantly white group. In addition, when the first proposed consent decree was before the court, the Transportation Department never offered to obtain, and bear the cost of, counsel for the hundreds of African-American class members who objected to that decree. This scenario does raise troubling questions about whether the Transportation Department's approach to these two proposed consent decrees has been based on a double standard that turns on the race of those who are complaining. Nevertheless, the court cannot say that these circumstances warrant an injunction prohibiting the Department from voluntarily paying the fees and expenses of counsel for the non-class-member employees. The record — which consists mainly of arguments in briefs — is insufficient to support any factual finding of discrimination. Moreover, the court believes that the wiser course is not to prohibit the Transportation Department from paying the fees and expenses of the non-class-member employees, but rather to assure that the Department treats the plaintiffs similarly in the future. The court will therefore wait and see whether the Transportation Department will be similarly concerned and generous when it comes to the fees and expenses of counsel for plaintiffs with regard to such issues as the trial of this case should the court not approve the new proposed consent decree, the issues

that will not be settled by the decree even if approved — the decree is only a partial settlement — and the many other issues that will surely arise in this litigation in the future.

II. MOTION TO INTERVENE

The non-class-member employees seek to intervene as plaintiffs in this lawsuit. The court must first reject two of the arguments raised in support of this motion. Relying on *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180 (1989), the non-class-member employees first argue that, if they are not permitted to intervene, they will not be bound by the decree. Section 108 of the Civil Rights Act of 1991 plainly states, however, that non-parties may not challenge a consent decree if they have had notice and an opportunity to object. 42 U.S.C.A. § 2000e-2(n)(1). Second, they imply that § 108 eases the requirements for intervention by providing "a process for joinder." Section 108, however, explicitly provides that the notice and opportunity-to-object provisions are to have no effect on intervention: "Nothing in this subsection shall be construed to — (A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure . . . ." 42 U.S.C.A. § 2000e-2(n)(2). Section 108, then, provides a process for only notice and an opportunity to be heard. In considering this motion to intervene, therefore, the court must look to Rule 24 of the Federal Rules of Civil Procedure.

Rule 24(b) sets forth the standard for permissive intervention:

> "Upon timely application anyone may be permitted to intervene in an action . . . (2) when

> an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The non-class-member employees' challenge to the proposed consent decree negotiated among the original parties involves, by its nature, questions of both law and fact in common with the original action. The non-class-member employees oppose the proposed decree primarily on the grounds that the race-conscious provisions of the decree are not within the permissible parameters for such relief. In considering whether to approve the proposed consent decree, the court must evaluate the facts to determine whether the Transportation Department discriminated against African-American employees and applicants in the past and to what extent — the same set of facts the non-class employees would be relying on to show that the race-conscious relief is not permissible. Furthermore, the court must, on the basis of this factual predicate, determine whether the relief embodied in the decree is indeed permissible under the legal standards for affirmative action — the same question of law raised by the non-class-member employees.

The court also concludes that the remaining requirements of Rule 24(b) are satisfied. The motion to intervene is timely because the decree has only been under consideration since November 18, 1993, and the motion to intervene was filed almost immediately after all non-class-member employees received notice of the settlement, and in advance of the

fairness hearing.[7] Furthermore, the granting of the motion to intervene would not prejudice the rights of the original parties. In fact, by addressing the concerns of the non-class-member employees at this time, the parties may benefit in the long-run from a decree that is less likely to be challenged at a later stage. Indeed, counsel for both the plaintiffs and defendants have already begun negotiating and cooperating with counsel for the non-class-member employees. Finally, the court, in its order of January 24, 1994, set forth a series of deadlines to expedite consideration of the non-class-member employees' objections to the decree, such that intervention would not unduly delay the court's consideration of the proposed decree. Because the non-class-member employees have satisfied the requirements of Rule 24(b), the motion to intervene will be granted.

In their opposition to the motion to intervene, plaintiffs seek to limit the scope of the intervention to the race-conscious provisions of the proposed consent decree. The court agrees. In *Howard v. McLucas*, 782 F.2d 956 (11th Cir. 1986), a group of non-class-member intervenors challenged "the legality of the race-conscious promotional remedy" in a proposed consent decree. *Id.* at 960. The Eleventh Circuit Court of Appeals limited the intervenors' challenge to the race-conscious provisions of the proposed decree. In this case,

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7. In similar circumstances, the Eleventh Circuit Court of Appeals found a motion to intervene to be timely, and rejected a district court's finding that the non-class members should have intervened at an earlier stage of the suit. *Howard v. McLucas*, 782 F.2d 956, 959-60 (11th Cir. 1986). The court refused to impute knowledge of the race-conscious remedies to the intervenors prior to the announcement of the proposed consent decree. *Id.*

the court will limit the non-class employees' challenge to the proposed consent decree to the provisions of the decree which affect them because of their race; they will not be permitted to contest, as intervenors, those provisions which are race-neutral and affect all employees equally.[8]

The *McLucas* court also did not permit the intervenors to challenge "the existence of past discrimination," *McLucas*, 782 F.2d at 960, and the plaintiffs urge this court to limit the non-class-member employee intervenors in the same manner. Given the vast amount of evidence of the Transportation Department's past employment practices already presented in this case, the court agrees with plaintiffs to the extent that it will not permit the intervenors to present additional factual evidence. The intervenors will be permitted to review the evidence presented in this case and rest their legal arguments on this evidence. On the basis of the evidence, they will be permitted to argue that the factual predicate is not sufficient as a matter of law to warrant the type or extent of race-conscious relief contained in the proposed decree.[9]

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8. In its order of January 24, 1994, the court granted the non-class-member employees the opportunity to file a statement of their unresolved objections to the race-neutral provisions of the proposed consent decree. The court's holding today on the scope of intervention is not inconsistent with its prior order. The non-class-member employees may only challenge the race-conscious provisions of the proposed decree as intervenors, but they may challenge the race-neutral provisions in their capacity as "objectors" within the meaning of § 108 of the Civil Rights Act of 1991.

9. Plaintiffs also urge the court to "ensure that discovery and other necessary proceedings are accomplished as quickly and (Cont'd)

Appendix G

Accordingly, it is ORDERED:

(1) That the motion for appointment of counsel for non-class employees, filed on January 10, 1994, by defendant Alabama Highway Department, now known as the Department of Transportation, is denied;

(2) That the motions for confirmation of group representation and for an order requiring defendant Alabama Highway Department to pay the reasonable fees and expenses of counsel for the non-class-member employees, filed on January 13, 1994, by non-class-member employees William Adams, et al., are denied; and

(3) That the motion to intervene as plaintiffs, filed on January 13, 1994, by non-class-member employees William Adams, et al., is granted to the extent that these non-class employees are permitted to intervene and challenge the race-conscious provisions of the proposed consent decree.

DONE, this the 9th day of February, 1994.

s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

(Cont'd)
efficiently as possible." *McLucas*, 782 F.2d at 961. The court is of the opinion that its order of January 24, 1994, which establishes a process to expedite the court's consideration of the non-class-member employees' challenge, is sufficient to meet plaintiffs' concerns. The court will consider requests in the future should it appear that the intervenors' challenge is causing undue delay.

APPENDIX H — MOTION TO IMPLEMENT UNOPPOSED PARTS OF PROPOSED CONSENT DECREE DATED MARCH 7, 1994

IN THE
UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NUMBER:
CV-85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF
TRANSPORTATION, et al.

Defendants.

MOTION TO IMPLEMENT UNOPPOSED PARTS OF PROPOSED CONSENT DECREE

Comes the plaintiffs, who move the Court to enter the attached Consent Decree I at the earliest practicable time so as to implement the Joint Statement of the parties and intervenors filed February 1, 1992 which stipulated to the parts of the proposed Decree which could be severed for separate approval. As grounds for this Motion, the plaintiffs state the following:

Appendix H

1. The proposed Consent Decree which was given preliminary approval in November, 1993 has been divided into three documents:

a. *Consent Decree I* contains all the provisions of the proposed Decree which are unopposed by the intervenors;

b. *Consent Decree II* contains the race-neutral provisions of the proposed Decree which have objections pending before the Court from the intervenors.

The provisions of Consent Decree II include:

1. Article Three, ¶ 5(a), ¶ 6 and part of ¶ 12;

2. Article Four, ¶ 3 (last sentence);

3. Article Seven, ¶ 3;

4. Article Nine, ¶ 6 (last sentence);

5. Article Thirteen, ¶ 4, ¶ 5(f);

6. Article Fifteen, ¶ 2.

The parts of the Decree separated into Consent Decree II are taken from the letter of David Whiteside dated March 3, 1994, except for the intervenors' change to Article Nineteen, ¶ 17 which the parties accepted.

c. *Consent Decree III* contains the "race-conscious" provisions of the proposed Decree set forth in *Joint*

Appendix H

Statement Pursuant To ¶ 4 of Order Entered January 24, 1994 which was filed by the parties and the intervenors on February 1, 1994 for the purpose of stipulating the parts of the proposed Decree which "should be severed from the remainder of the Decree for consideration at or subsequent to the further proceeding scheduled for February 25, 1994". See, Joint Statement, (copy attached). The provisions of Consent Decree III include:

1. Article Nine, ¶ 3;

2. Article Eleven, except ¶ 11, ¶ 20, ¶ 22;

3. Article Twelve;

4. Article Thirteen, ¶ 3(a);

5. Article Nineteen, ¶ 14 and ¶ 15.

2. The division of the proposed Decree into the foregoing documents are consistent with the parties' and intervenors' agreement regarding the contested and uncontested portions of the Decree.

3. It is important to the interests of the class that the uncontested portions of the settlement set forth in Consent Decree I be entered by the Court as soon as possible. Recruiting, training, hiring and promotional opportunities will continue to be lost on a daily basis in the absence of prompt entry of Consent Decree I.

4. It is also important that Consent Decree II be entered as soon as possible. The plaintiffs' Response to the intervenors' proposed changes to the race-neutral provisions of the settlement contained in Consent Decree II was filed February 3, 1994. The plaintiffs are prepared to orally argue such disputes at the hearing on March 7, 1994.

5. The plaintiffs do not mean to suggest that the provisions of the Consent Decree III are any less important, or any less in need of expedited entry, but recognize that the issues involved in approval of those provisions are more complex and time consuming than the ones contained in Consent Decree I and II.

WHEREFORE, for all the foregoing reasons, the plaintiffs request that Consent Decree I and II be severed for separate entry at the earliest possible time.

Respectfully submitted,

s/ Robert L. Wiggins
Robert L. Wiggins, Esq.
Alabama State Bar Number:
247-82-1754
Attorney For Plaintiffs and the Class

OF COUNSEL:
GORDON, SILBERMAN, WIGGINS & CHILDS
1400 SouthTrust Tower
Birmingham, Alabama 35203

APPENDIX I — ORDER OF THE DISTRICT COURT OF UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION DATED AND FILED MARCH 16, 1994

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

CIVIL ACTION NO. 85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF
TRANSPORTATION, et al.,

Defendants.

ORDER

The court has before it motions relating to the approval of certain segments of a proposed consent decree submitted to the court by the parties on November 18, 1993, and preliminarily approved by the court on November 19, 1993. Pursuant to the court's order of January 24, 1994, the proposed decree has been divided into three segments:

Consent Decree I contains all provisions of the proposed decree which are unopposed by the intervenors;

Consent Decree II contains certain provisions of the proposed decree to which the intervenors object, including provisions which the intervenors contend are "race-conscious" and the plaintiffs contend are not; and

Consent Decree III contains certain other provisions of the proposed decree to which the intervenors object, namely, the provisions that the parties and intervenors agree are "race-conscious," as set forth in the "Joint Statement Pursuant to ¶ 4 of the Order Entered January 24, 1994," filed by the parties and the intervenors on February 1, 1994.

On March 7, 1994, plaintiffs filed a motion seeking approval of Consent Decrees I and II. Subsequently, the parties and the intervenors resolved certain of the intervenors' objections to provisions contained in Consent Decree II and moved those provisions to a revised Consent Decree I. On March 9, 1994, intervenors filed a motion requesting the court to adopt their proposed revisions to the provisions of Consent Decree II. The parties and intervenors are in agreement that Consent Decree I, as revised, contains only "race-neutral" provisions; the intervenors do not object to the court's approval of Consent Decree I.

The court finds Consent Decree I to be "fair, adequate, and reasonable." *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1214 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020 (1979); *Paradise v. Wells*, 686 F. Supp. 1442, 1444-46 (M.D. Ala. 1988) (Thompson, J.). Furthermore, because the parties and intervenors agree that the provisions of Consent Decree I are race-neutral, the court need not engage in strict-scrutiny analysis to determine if

any race-conscious relief is legal. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503, 506, 109 S.Ct. 706, 727, 728 (1989); *Peightal v. Metro. Dade County*, 940 F.2d 1394, 1399 (11th Cir. 1991) (majority opinion). The court concludes that the provisions of Consent Decree I are neither illegal nor against public policy. *United States v. Alexandria*, 614 F.2d 1358, 1362 (5th Cir. 1980); *Harris v. Graddick*, 615 F. Supp. 239, 242 (M.D. Ala. 1985) (Thompson, J.). The court therefore determines that there is no just reason to delay the approval of Consent Decree I.

The court will consider final approval of Consent Decrees II and III separately at a later time. Plaintiffs' and intervenors' motions with respect to Consent Decree II will therefore be denied without prejudice.

Accordingly, it is the ORDER, JUDGMENT, and DECREE of the court:

(1) That the motion to implement unopposed parts of proposed consent decree, filed by the plaintiffs on March 7, 1994, is granted as to Consent Decree I and denied without prejudice as to Consent Decree II;

(2) That the motion for approval of unresolved objections to non-race-conscious aspects of consent decree, filed by the intervenors on March 9, 1994, is denied without prejudice.

DONE, this the 16th day of March, 1994.

s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

APPENDIX J — CONSENT DECREE I OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION DATED AND FILED MARCH 16, 1994

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF
TRANSPORTATION, et al.,

Defendants.

CONSENT DECREE I

This lawsuit was filed under Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 1981 and § 1983 alleging racial discrimination in employment. The case has been certified and maintained as a class action on behalf of the following:

A. All black merit system employees employed by the Alabama Highway Department at any time since May 21, 1979, with said class represented by plaintiffs Johnny Reynolds, Ouida Maxwell, and Martha Ann Boleware; and

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B. All black non-merit system employees of the Alabama Highway Department and all black non-employees who have unsuccessfully sought employment as merit system employees with the Alabama Highway Department at any time since May 21, 1979, with said class represented by plaintiffs Peggy Vonsherrie Allen and Jeffrey Brown.

A recess in the trial of the case for the purpose of settlement negotiations has resulted in the Consent Decree which follows. The following terms and provisions of this Consent Decree are accordingly agreed to in final and complete resolution of all class issues which have been asserted in the case, subject to the provisions of this Decree providing for further proceedings, including but not limited to Articles 20 and 21.

ARTICLE ONE
RECRUITMENT

A. EXPANDED RECRUITMENT PROGRAM:

Highway will, within 60 days of approval of the Consent Decree, develop a written plan for recruitment which will contain at least the following provisions:

1. Recruitment of engineering students: Direct recruitment of every black civil engineering and civil engineering technology student enrolled in colleges in the Southeastern United States having black persons enrolled in such programs and at the Howard University Engineering School, with the following minimum efforts for each person:

Appendix J

(a) Initial recruitment efforts to be initiated for each such person no later than one year after enrollment in such program.

(b) Direct contact with such persons throughout the remainder of their enrollment in such program, with a minimum of one contact each six months until one year after graduation or the candidate is placed on the GCE register, whichever occurs first.

(c) Documentation in a standard format of each contact with such student or graduate and the reason they did not apply or were not placed on a register.

(d) Encouragement and assistance in applying for the position of GCE and other appropriate positions.

(e) Monitoring of the progress of each such person's application through the application, examination, registration, certification and selection process and assistance at appropriate points that may enhance their eventual availability to the Highway Department on COE's.

(f) Development of a program to encourage and assist such students and/or graduates in taking and satisfying the requirements of the EIT, registration with the appropriate licensing agencies, and eventual licensing by such agencies.

(g) Use of monetary incentives to attract black candidates by starting persons having the EIT in a GCE pay grade no lower than pay grade 2.

(h) The Highway Department will fund a program in cooperation with Alabama A&M University to increase awareness of and interest in civil engineering careers with the Highway Department and provide preparation for the FOE examination for students in civil engineering and civil engineering technology programs. Such funding will be $20,000.00 per year for a duration of 5 years.

(i) Encouragement and assistance in applying for the position of PCET and revision of certain aspects of PCET program so as to increase the availability of black engineers through such program.

2. Recruitment of persons with EIT or RPE Certification: Direct recruitment to the extent practicable of every black person who holds the EIT or a professional engineering license issued by the State of Alabama and who has a degree in civil engineering or civil engineering technology, with the following minimum efforts for each such person:

(a) Initial recruitment efforts to be initiated for each such person no later than 60 days after entry of the Decree.

(b) Continuous recruitment efforts until the person states that they are not interested in working for the Highway Department or they are placed on an appropriate register for GCE, GRE, or PCE.

(c) Documentation in a standard format of each contact with such person and of the reason they did not apply, were not placed on a register or COE, or were not selected.

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(d) Encouragement and assistance in the process of applying and being examined, registered, certified and considered.

(e) Monitoring of the progress of each such person's application through the application, examination, registration, certification and selection process and assistance by Highway at appropriate points that may enhance their eventual availability to the Highway Department on COE's.

(f) Use of monetary incentives to attract black candidates by starting persons having the EIT in a GCE pay grade no lower than pay grade 2.

3. *Recruitment of Persons with CE or CET Degrees*: Direct recruitment of every black person who can reasonably be identified as holding a degree in civil engineering or civil engineering technology by means of Highway requesting the names and addresses of such persons from colleges in the Southeastern United States having such programs and at Howard University and contacting such persons as are identified by such means and by taking the steps set forth in Paragraph 2 above with respect to such persons.

4. *Recruitment for higher level Engineering jobs*: For the Engineering positions above Civil Engineer I, the program will identify special means by which qualified black candidates can be recruited and, within the limits of merit system rules, employed. The attorney for the class shall have the right to review and object to the means adopted and to seek further relief by petitioning the Court for such relief.

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5. *Persons to be included in recruitment efforts*: The expanded recruitment program will include, but not be limited to, the following:

(a) Recruitment in the Southeastern United States at educational institutions having black students enrolled and at Howard University in educational programs related to the job classifications listed in Paragraph 19 of Section B of this Article.

(b) Recruitment addressed to —

(i) Current employees regarding career paths/ better job opportunities.

(ii) Applicants rejected or not selected.

(iii) Employees certified but not selected regarding potential opportunities in other jobs.

(iv) Applicants within the past 5 years who have not reapplied or kept their eligibility active or current, except the period shall be 10 years for the engineering job classes.

(v) Eligibles who have been certified-out from Personnel to Highway during the past 5 years but failed to schedule or appear for an interview, except the period shall be 10 years for the engineering job classes.

(vi) Existing eligibles who may be able to improve their score or rank by being reexamined or by further training or education.

(vii) Past employees who may have left the Highway Department because of a perception of limited opportunities.

(viii) Employees who may be able to advance through reclassification or reallocation.

(ix) Any other potential source of candidates or means by which job opportunities for black persons may be improved.

6. *Encouragement and assistance*: The expanded recruitment program will include verbal and written encouragement and assistance by the Highway Department with applicants and potential applicants to offer assistance or advice in moving through the application, examination, certification, and selection process. The phrase "potential applicants" as used in this Paragraph 6 means:

(a) Persons who have to the knowledge of the Highway Department expressed an interest in applying;

(b) Persons who the Highway Department has reason to know may be interested in applying;

(c) All black students in civil engineering or civil engineering technology programs at colleges in the Southeastern United States having such programs and at Howard University;

(d) Such persons as are identified by the procedure set forth in Paragraph 3 above as graduates of civil engineering or civil engineering technology programs in the 10 years prior to the effective date of this Decree.

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7. Evaluation: The steps taken in connection with and the results of the expanded recruitment program will be evaluated at least quarterly by the Highway Director and the Personnel Director or their designees. The result of such evaluation and the data used in the evaluation process will be reported in the quarterly reports required by the Settlement Decree. Personnel will institute a system of tracking the source of the applicant's knowledge of job opportunities and recruiting efforts to which he/she was subject, which at a minimum, will include responses to inquiries of the applicant or his application and computerized tabulation of such data into a report which allows monitoring of the effectiveness of recruiting sources. Such data shall be provided to the plaintiffs' attorney within 30 days of the end of each calendar quarter of the year during the duration of this Decree.

8. Frazer/Ballard: The expanded recruitment program will include recruitment which extends beyond the past and existing recruitment activities by Highway and beyond the recruitment obligations provided for in *Frazer/Ballard*.

9. Nationwide advertising: Such expanded recruitment program will include special nationwide advertising campaigns designed to reach qualified black candidates.

10. Intensified Recruiting: Personnel will conduct monthly reviews of the racial composition of all registers for the classes listed in Paragraph 19 of Section B of this Article. Whenever the black proportion of eligibles who are reachable on the Register for the next three vacancies for such classifications is less than 15% of the total eligibles on such Register for such job, the Personnel Department will

so notify the Highway Department, and the Highway Department within 10 days of such notice will commence special intensified nationwide recruiting and advertising aimed at increasing the total number of black eligibles on such Register for such job classification to the 15% level. Such intensified recruiting will also consist of the following:

(a) Highway will pay the expenses associated with bringing top black candidates to Alabama in order to provide them with the opportunity to see the work environment and be interviewed; provided, however, that such expenses will not exceed 10 persons per year up to a maximum of total expenses for all such 10 persons together of $10,000 per year. Provided that in the event the Highway Department has not achieved the goals provided for by Article Eleven with respect to the jobs listed in Paragraph 19 of Section B of this Article by the end of a calendar year during the term of this Decree, the maximum in the next succeeding calendar year will be up to 15 persons and $15,000 total expenses for all 15 such persons together. Provided further that the obligations provided for by this sub-paragraph (a) shall not be extended beyond December 31, 2000 and that the Highway Department will decide which black candidates will be paid such expenses within the spirit or the purposes of this Decree.

(b) Highway will engage in the efforts described in Paragraph 2 above of this Article One of this Decree;

(c) Highway will utilize monetary incentives when necessary to attract such black candidates by starting

them in a pay grade no lower than pay grade 2 or at such other level within the permissible range as is necessary for them to accept employment with the State of Alabama;

(d) Highway will utilize further monetary incentives to attract such black candidates for the PCET, GCE, GRE and PCE jobs by starting those who had at least a 3.5 average in college and 12 months of civil engineering experience at no less than Step 4 of Pay Grade 2;

(e) For advanced entry in job classifications above the entry level, Highway will provide such orientation and training as is reasonably necessary to allow the black candidate to make the transition to the methods of work and organization of the Highway Department and will inform the applicant or potential applicant that such special efforts will be made so that advanced entry is both feasible and successful;

(f) Highway will document any difficulties or obstacles encountered in recruiting or appointing each such black applicant and, to the extent practicable, will develop and implement policies or programs aimed at removing such obstacles or recruitment.

11. Colleges: Geographic Scope:

(a) The State Highway Department will conduct a program of on-campus recruiting at the following colleges and universities:

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— Alabama A & M University

— Alabama State University

— Auburn University

— Auburn University in Montgomery

— Miles College

— Stillman College

— Talladega College

— University of Alabama

— University of Alabama in Birmingham

— University of Alabama in Huntsville

— University of South Alabama

— Georgia Institute of Technology

— Southern University

— Florida A & M University

(b) The expanded recruitment program will utilize a wider-geographical area than Alabama which encompasses all colleges having black students enrolled in any educational program leading to satisfaction of the educational

requirements of the jobs subject to Paragraph 19 of Section B of this Article in the Southeastern United States and Howard University.

12. Study of other recruitment programs: The recruitment efforts of other employers outside of state government will be studied and, if requested by the plaintiffs, an outside expert on recruitment would be consulted in devising the expanded recruitment program.

13. Dissemination of information: The expanded recruitment program will include the dissemination of written information to applicants regarding the application, ranking, certification, and selection process so that all applicants have equal opportunity to learn how to maximize their chances of being ranked higher on registers for Highway Department jobs, of being certified to the Highway Department, and being selected by the Highway Department.

14. All recruitment activities shall be documented in a manner, means and format agreed between the parties.

15. (a) At least 50% of the on-campus recruiting each calendar year during the term of this Decree will be made by a black staff member of the State Highway Department assigned to recruiting. When any on-campus recruiting during the term of this Decree is made by more than one State Highway Department recruiter on one recruiting trip, at least one of such recruiters is to be black.

(b) The State Highway Department will provide to offices of the Alabama State Employment Service announcements of openings for or examinations for the jobs set forth in Section 19 of Section B of this Article.

(c) On a semi-annual basis during the terms of this Settlement Decree, the State Highway Department will place a notice as set forth in the attached Appendix __ inviting applicants to apply with the State Personnel Department for State Highway Department jobs in the following newspapers:

— The Birmingham Times

— The Montgomery Tuskegee Times

— The Mobile Beacon

16. Nothing contained in this Decree is intended or shall be construed to limit the colleges or sources at which the State Highway Department conducts any recruitment.

17. The Student Aide Co-Op program presently in effect will remain in effect during the term of this Decree.

18. The recruitment demands and standards imposed upon the State Personnel Department and the State Highway Department under the Decree entered in *United States v. Frazer*, 317 F.Supp 1079 (M.D. Ala. 1970), and as amended from time to time, will continue to guide such Departments in its recruitment during the duration of this Decree.

B. JOBS TO WHICH THE EXPANDED RECRUITMENT PROGRAM WOULD APPLY:

19. Jobs covered by the program: The expanded recruitment program will apply to the following merit system job classes at the Highway Department:

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(a) The PCET, GCE, and GRE classes.

(b) The Professional Civil Engineer and Civil Engineer classes.

(c) The Accountant and Auditor job classes, the Project Cost Auditor job classes, the Right-of-Way job classes, the Engineering Assistant job classes, Highway Maintenance Superintendent, Chemist I, Community Planner I, Electrical Engineer, Geologist I, Highway Office Manager, Programmer I, Programmer-Analyst I, Transportation Planner I, and such other job classes for which an open competitive job announcement is utilized and the percentage of black persons on the Register for such job is more than 5% lower than the availability of persons in the Alabama labor force for such job or job family, provided, however, that if the Highway Department does not anticipate an opening in the coming 12 months in such a job, such expanded recruitment programs will not apply with respect to such job. In the event the Highway Department determines that it does not anticipate such an opening in the coming 12 months, it will notify the plaintiffs' counsel of such determination and the job or jobs in which it does not anticipate such an opening.

ARTICLE TWO
MINIMUM QUALIFICATIONS

1. Limitation on the use of minimum qualifications: Minimum qualifications will not be utilized on examination announcements or to preclude an applicant from examination

unless the minimum qualification bears a manifest relationship to skills, knowledges, or abilities necessary to the performance of the job at entry without a brief orientation period and such skills, knowledges or abilities are not addressed in the examination process.

2. Consultation:

(a) Subject to Article Four on Implementation of Personnel Projects, Personnel will forthwith utilize a content validation procedure to determine the appropriate minimum qualifications for the Highway Department job classes. Such determination and the SPD validation procedure will be subject to challenge by plaintiffs and no new minimum qualifications will be implemented without approval by the plaintiffs or the Court.

(b) Appointments in the interim between the effective date of this Decree and the completion of the requirements of this Article shall be governed by the provisions of Article Four of this Decree entitled Implementation of Personnel Projects.

3. Use of Minimum Qualifications In Examinations: Nothing in this Article of the Consent Decree shall preclude the use of minimum qualifications as a part of the examination process provided that such minimum qualifications satisfy Paragraph 1 of this Article and have been determined to be valid within the meaning of the Uniform Guidelines of Employee Selection Procedures by the State Personnel Department.

4. High School Diploma and GED. The State Highway Department will be permitted to use a high school diploma or a GED as a minimum qualification after it has been validated in accordance with the requirements of this Decree (including Paragraph 1 of this Article) and the Uniform Guidelines on Employee Selection Procedures by the State Personnel Department.

ARTICLE THREE
SCORING AND RANKING

1. Cooperation with the State Personnel Department: The Highway Department will cooperate with the Personnel Department in formulating and implementing the steps to be taken by the Personnel Department pursuant to the scoring and ranking provisions of the Settlement Decree.

2. Highway Department program: The Highway Department will develop and implement a program designed to achieve the following:

(a) Assuring to the extent practicable that black employees are provided with equal opportunities to be assigned to duties of the jobs they hold comparable to the assignment of white employees on such job to such duties, provided that this is not intended to require all employees on a job to be assigned to the same duties or to require the assignment of anyone to duties which they are not qualified to perform after normal training and/or orientation.

(b) Developing a procedure for informing employees regarding career paths within the Highway Department.

(c) Providing an equal opportunity to black employees for participation in training programs comparable to training programs in which white employees on the same job participate.

(d) Developing a system for monitoring the progress of the above procedures.

3. Plan to monitor adverse impact:

(a) Personnel will maintain adequate means for measuring and monitoring the adverse impact of screening and selection criteria used in eligibility for examinations, ranking, scoring and forming Registers or COE's and will submit such means to the plaintiffs' attorney for review and comment.

(b) Within 90 days of the approval of the Decree, the Highway Department will submit its plan for measuring and monitoring the impact of the selection criteria used in appointments.

(c) In the absence of agreement, the Court will decide the adequacy of the means of measurement and monitoring.

4. Validation of criteria:

(a) Personnel will develop and thereafter use only selection criteria and procedures that have been validated in accordance with the Uniform Guidelines on Employee Selection Procedures. For the SPD Project job classes,

such validation will be completed within two years of the effective date of this Decree; for all other Highway Department jobs they will be completed within a reasonable period after the effective date of the Decree, subject to the right to seek further relief set forth in Paragraph 4 of Article Four on Implementation of Personnel Projects.

(b) Appointments in the interim between the effective date of this Decree and the completion of the requirements of this Article shall be governed by the provisions of Article Four of this Decree entitled Implementation of Personnel Projects.

5. Choice of examination types: The choice among examination types (written, T & E, structured oral interview, etc.) will be made based on the results of the job analysis; provided, however, that such analysis shall be subject to challenge by the plaintiffs in the event it is found to be inadequate to achieve the purposes of this Consent Decree. With respect to written tests:

(a) SPD will use written tests only when:

(i) The minimum qualifications for the class confirms that all candidates taking the test have the necessary reading abilities to pass the test, and either:

(ii) The job analysis supports the need to read and understand written instructions and/or information; or

(iii) A large number of candidates must be screened.

(b) All written tests which are developed will be:

(i) Checked for reading level to assure that it is at no higher level than defined by the minimum qualifications; and

(ii) Reviewed by a socio-linguistic specialist to identify and correct any wording which may introduce a cultural bias.

(c) SPD will actively look for alternative selection procedures which may have less adverse impact.

6. ***Pending Court Approval***

7. Validation studies for written tests will be conducted in accordance with the Uniform Guidelines on Employee Selection Procedures.

8. During the selection of examination type and development of the selection instrument, SPD will search for effective alternative devices which would have lesser disparate impact. Where a selection device shows substantial disparate impact upon use, SPD will search for effective alternative devices which would have lesser disparate impact in future selection decisions, and will utilize such devices unless impracticable; provided, however, that this paragraph, and this Decree as a whole, will not modify or affect any obligation of the parties bound by this Decree which arises under federal or state law or regulations, the remedies and requirements set forth in *Ballard/Frazer*, or the Uniform Guidelines on Employee Selection Procedures.

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9. Content of examination announcements: Prior to administering examinations after the effective date of this Decree, defendants will develop, in cooperation with a qualified industrial psychologist, an examination announcement or material accompanying the application informing prospective applicants of the nature of the selection procedures, the characteristics the procedures are designed to assess, and the information with which the applicants are expected to be familiar on the examination.

10. Documentation: Defendants will make available to plaintiffs' attorney sufficient information and documentation to show that the development and implementation of the selection procedures conform to the Uniform Guidelines. All validation efforts shall be documented in writing and make available to plaintiffs' counsel for review at least 30 days before an Examination Announcement or other use of the examination which is the subject of such validation effort.

11. Except to the extent that service ratings are a component of the examination, all examinations shall be administered by Personnel without involvement of any Highway employees in any aspect of the administration, including the scoring, ranking, evaluating, grading, or assessing of applicants; provided, however, that the parties may agree to relax this requirement for any future selection procedure that utilizes Highway personnel in administration of valid examinations which necessitate such involvement by Highway, such as assessment centers, or other structured examination procedures, and provided further that nothing contained in this Decree will preclude or limit the use by Personnel of Highway employees as "subject matter experts" in a validation project.

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12. Prohibition of Divulging Contents of Examinations: Personnel and Highway will develop means to prevent, to the extent practicable, activities which have the purpose or effect of disclosing the content of examinations to applicants or examinees, or potential applicants or examinees, prior to administration of examinations, or which have the purpose or effect of aiding some applicants or examinees in the examination process in ways which are not available to all applicants who are eligible for the examination; provided, however, that this paragraph will not be used to inhibit or prevent any formal training offered equally to all applicants or potential applicants so long as such training is disclosed to the Personnel Department in writing and that Department does not find, after review, that such training compromises the validity or reliability of the examination or the examination process. The means used to prevent potential compromise of the examination process will include, but not be limited to;-(1) a policy which prohibits the types of activities listed above and which is disseminated to all applicants or potential applicants with a warning that violation of the policy may result in discipline (up to and including discharge from employment), and/or disqualification from examination process for a prescribed period of time of not less than one year; and (2) a set of procedures for monitoring and investigating activities which may compromise the examination process; provided nothing in this paragraph shall prohibit applicants from forming study groups whether or not these study groups admit all applicants.

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ARTICLE FOUR
IMPLEMENTATION OF PERSONNEL PROJECTS

1. This Decree establishes a number of duties for Personnel, including four projects that will involve substantial studies:

(a) Validation of minimum qualifications (Article Two);

(b) Examination validation (Article Three);

(c) Study of multi-grade job (Article Fifteen); and

(d) Analysis of individual reclassification requests (Article Fifteen).

2. Projects (a) and (b) set forth in Paragraph 1 above will focus on the following principal Highway Department classifications: Highway Maintenance Technician, Engineering Assistant, Professional Civil Engineer Trainee, Graduate Civil Engineer, Graduate Registered Engineer, Civil Engineer, Professional Civil Engineer, Right-of-Way Specialist, Project Cost Auditor, and Highway Office Manager. The classifications listed in the preceding sentence are referred to in this Decree as the "SPD Project Classes." The precise sequencing is to be determined by Personnel, provided that the goal is to complete all four projects within two years of the effective date.

3. Upon approval of this Decree, then-existing Registers for the SPD Project Classes will be abolished. During the

period between the effective date of this Decree and the creation of new registers using newly validated minimum qualifications and examinations, vacancies in the SPD Project Classes identified in Paragraph 2 above may be filled by provisional appointments, which appointment may extend to the time of creation of such new registers. ***LAST SENTENCE PENDING COURT APPROVAL***

4. With respect to non-SPD project classes, if plaintiffs contend that existing registers do not provide sufficient opportunity for the Highway Department to satisfy the goals or minimum number of appointments required under this Decree, then the plaintiffs may seek further relief from the Court.

ARTICLE FIVE
BANDED SCORING

PENDING COURT APPROVAL

ARTICLE SIX
REGISTERS

1. Continuous registers: With respect to the SPD Project Classes, the Personnel Department will use continuous registers. Continuous registers will also be used for any job classification that has been subject to continuous registers at any time since 1979, and for any other job classification for which Continuous Register will aid recruitment of black applicants unless Personnel determines that current registers would enhance the prospects of black applicants and potential black applicants. With respect to non-

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SPD Project Classes, if plaintiffs contend that existing registers do not provide sufficient opportunity for the Highway Department to satisfy the goals or minimum number of appointments required under this Decree, then the plaintiffs may seek further relief from the Court.

2. *Promotional registers*:

(a) In the establishment of Promotional Registers for the SPD Project Classes, the weight to be given to the service ratings component in the ranking of eligibles on the register will be 10% percent and not higher of the total ranking score. This provision does not otherwise restrict the utilization of service ratings, including specifically the banding of service rating scores, subject to Article Five of this Decree regarding Banding practices.

(b) Eligibility for placement on Promotional Registers for the classes described in the SPD Project Classes will not be restricted to service in the immediately preceding feeder job (including EA-3 as a feeder for CE-1), and will include no residency requirement higher than one year of service in the line of progressions leading to the job or experience at the level of such service; provided, however, that the applicant has the work experience, degree, license, or certification which is a minimum qualification for the job to be filled on an open-competitive basis; and provided further that this Paragraph 2(b) will not apply to the following:

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a. PCE-2 and above;

b. GRE;

c. Highway Maintenance Superintendent;

d. As to CE-3 and above, the procedure will be that —

— A CE-3 may advance to CE-5 (but not higher) without service as a CE-4;

— A CE-4 may advance to CE-6 (but not higher) without service as a CE-5; and

— A CE-5 may advance to CE-7 without service as a CE-6.

e. In the event any grade of the multi-grade jobs listed above is restructured in or as a result of the job classification study provided for by Paragraph 3 of Article Fifteen ("Reclassification and Reallocation"), the provisions in sub-sections a and d will remain in effect with respect to the restructured grades.

(c) The provisions of this Paragraph 2 are subject to Paragraph 8 of Article Nineteen ("General").

3. Purging from a register: The following provisions will be adopted with respect to the purging of a name from a register for the SPD Project Classes:

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(a) Personnel may continue to purge names from continuous registers after two years.

(b) At least 45 days before a name is to be purged from a continuous register pursuant to (a), Personnel will give written notice to the applicant and to Highway and shall maintain adequate documentation of such notice.

(c) The Highway Department will thereupon contact or attempt to contact the person whose name is proposed to be purged to inform them of their right to reapply for the job and to otherwise recruit and encourage such person to maintain their eligibility. Any black applicant who requests that his name remain on the register will not be purged pursuant to (a). The Highway Department shall notify Personnel of the completion of such efforts and the response, if any, of the applicant within 40 days of receipt of Notice of proposed purging from Personnel. If the applicant has not indicated he wishes to remain on the Register, copies of such notice to Personnel from the Highway Department will be furnished to plaintiffs' counsel at the time such Notice is sent to Personnel. Personnel shall not purge the names of any persons until after receipt of such response from the Highway Department. Within three days of such purging, Personnel shall notify the applicant that he has been removed from the Register and of his right to be reinstated to the Register upon request. Adequate written or computerized documentation of all such contacts, attempts, encouragement, recruitment and requests shall be maintained and available for inspection by the plaintiffs' counsel.

(d) Personnel may continue to place in an inactive status the name of any person who declines three opportunities for consideration or selection in writing.

(e) Whenever a black applicant is to be made inactive pursuant to (d), Personnel will give notice to the applicant and Highway at least 45 days before the applicant is inactivated. Highway will then make the efforts required by (c). Any black applicant who thereafter requests reactivation will be reactivated.

4. Abolition of registers: The following provisions will be adopted with respect to the abolition of current registers for the SPD Project Classes:

(a) A register will not be abolished or replaced without an analysis of the impact of such replacement on black applicants and the goals set out in this Decree, and will be abolished only when the age and composition of the register, new job analysis, or other factors indicate that a new register should be found.

(b) When a register is abolished or replaced, Personnel will, two weeks before the application deadline for the new examination, notify Highway of the identify of any black eligibles on the abolished or replaced register who have not reapplied for the new register and Highway will then engage in the special recruitment efforts to encourage applications set forth in Paragraph 3 (c) immediately above.

(c) All black eligibles on the abolished or replaced register who reapply for the new register shall be placed on such new register.

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ARTICLE SEVEN
CERTIFICATES OF ELIGIBLES

1. Request for COE: When a permanent opening occurs in a classified position at the Highway Department and such job opening is to be filled, the Highway Department will request a COE for such job opening within 30 days, provided that —

(a) This is not intended to require the filling of a job and will apply only where it is Highway's decision to fill the job.

(b) There is a requisition and funding for such job.

(c) This will not preclude a subsequent filling of the job by a request by the Highway Department for a COE, provided that the Highway Department gives notice in writing to the Personnel Department of non-discriminatory justification for not having requested a COE within such 30 day period and subsequently requesting a COE.

(d) For any permanent opening in a classified position at the Highway Department which is not to be filled through a COE within 30 days of any event which causes the permanent opening, the Highway Department shall give notice to Personnel of the reason for not filling such opening.

2. No delay in requesting a COE: The Highway Department will not delay requesting a COE for a permanent

opening in a job which is to be filled for any purpose of avoiding or attempting to avoid the certification or appointment of black eligibles on the register for such job.

3. Register to be used for COEs: ***PENDING COURT APPROVAL:***

* * *

4. Pre-screening:

(a) The Personnel Department will not provide the Highway Department with the means of knowing the identities or the racial composition of potential Certificate of Eligibles before the official issuance of such a Certificate.

(b) The Highway Department will take appropriate action to assure that officials and employees of the Highway Department do not have access to and do not use information about the probable composition of alternative Registers or Certificates of Eligibles in determining when to fill positions, from what Registers to fill positions, or any other advance information which may have the purpose or effect of favoring or disfavoring persons of one race over another.

5. TIED SCORES: Where black eligibles and white eligibles would appear on the same Certificate of Eligibles with tied scores, Personnel will continue to certify all such eligibles but will use a procedure to be developed by it to

break the tie. The plaintiffs' attorney will have the right to review and object to the procedure used and to petition the Court with regard to the subject before it is implemented.

ARTICLE EIGHT
INTERVIEWS BY THE HIGHWAY DEPARTMENT

1. Interviews of black eligibles on a COE: When black eligibles appear on a COE, Highway will schedule interviews with them and will conduct the interview before deciding whom to select for the job; provided, however, that if a black eligible cannot be located, fails to respond or declines an effort to schedule an interview after the efforts required by Paragraph 3 of this Article ("Failure to Appear for Interviews"), Highway may fill the position without conducting an interview of that applicant.

2. Standard interviews: The Highway Department will develop and use standard format interview questions which will to the extent practicable be designed to elicit objective non-discriminatory job related information relating to the applicant and the job to be filled.

3. Failure to appear for interviews: If a black eligible on a COE fails to appear for a scheduled interview or fails to respond to the Highway Department's invitation to schedule an interview, the Highway Department will make reasonable and good faith efforts to contact such person to advise him or her of the importance of the interview and to provide another opportunity for an interview.

4. Interviewers: For all Highway employees who conduct interviews, the Highway Department will develop

and implement a training program in interviewing techniques and procedures for the purpose of minimizing to the extent practicable any disadvantage to black eligibles in the interview process.

5. Forms to be filled out by interviewers: The Highway Department will develop and use forms to be filled out by the interviewer or interviewers which will list the job-related qualifications of each eligible interviewed.

ARTICLE NINE
APPOINTMENTS

1. Monitoring by the EEO Bureau:

(a) The racial composition of appointments to each job will be monitored by the Highway Department's EEO Bureau on a periodic basis in comparison to the racial composition of eligibles certified for such job to determine the selection rate of black eligibles.

(b) The periodic basis for such monitoring will include appointments on the following intervals: quarterly, annually, 3 years, 5 years, and such other periods as are necessary to assess the Highway Department's progress.

(c) The Highway Department's EEO Bureau shall monitor recruitment progress and the selection process so as to assure that the purposes of this Decree and Highway's Affirmative Action Program are fulfilled. To this end, such EEO Bureau shall develop a systematic

written program for such monitoring within 90 days of the effective date of this Decree and will submit it within 10 days thereafter to plaintiffs' counsel for comments and review.

2. Form as to the eligibles selected: In connection with appointments, the Highway Department will develop and use a form which will state the reason that the eligible selected for appointment is regarded as the best qualified candidate for the job.

3. Role of race: ***PENDING COURT APPROVAL***:

4. Prohibitions in connection with appointments: The Highway Department will not avoid or attempt to avoid the appointment of black eligibles on registers by means of canceling requests for certifications, returning certifications, requesting the abolishment of registers, delaying requests for certifications or appointments, or any other means.

5. Effort to include black employees in the interview and selection process: In conducting interviews and in making appointments, the Highway Department will endeavor to the extent practicable —

(a) To include black employees among the interviewers, and

(b) To include black employees among the persons making decisions regarding the eligible to be appointed.

6. Provisional Appointments: Provisional appointments will be made only in accordance with Section 670-X-9-3(3)(d)

of the rules of the Personnel Department, and in no circumstances will be used to avoid black eligibles or the other provisions of this Decree. ***LAST SENTENCE PENDING APPROVAL OF COURT.***

ARTICLE TEN
HIGHWAY DEPARTMENT JOBS AND CAREER PATHS

1. In-house jobs: The Highway Department will develop and use a designation of the merit system jobs which may fill each of the in-house job titles utilized by the Highway Department.

2. Career paths: The Highway Department will develop and disseminate to employees a written description of the in-house job titles and career paths available within the Highway Department and the merit system job classifications and Registers from which the jobs in each career path may be filled.

3. Manager or supervisor programs: Within 180 days of the effective date of the Decree, and thereafter on an annual basis, the Highway Department will —

(a) Conduct a supervisory management orientation program, open to all interested employees, for the purpose of explaining the management and supervisory positions in the Highway Department career paths and the duties and responsibilities of such jobs.

(b) Conduct a supervisory management update program to be attended by all managers and supervisors

for the purpose of reporting on the progress of the Highway Department pursuant to the Settlement Decree, to apprise them of ongoing and proposed Highway Department projects, and to provide training in new or updated techniques in management and supervision.

ARTICLE ELEVEN
GOALS

PENDING COURT APPROVAL, EXCEPT FOR PARAGRAPHS 11, 21 AND 22

* * *

11. The Highway Department will take affirmative steps to have eligible black employees of the Department receive assignments at rates proportional to their representation in the relevant job classifications to the better in-house job titles at the Highway Department. In the event that the plaintiffs conclude that the efforts of the Highway Department in this area are not adequate, they may petition the Court for further relief in this area during the pendency of this Decree.

* * *

21. Any Engineering Assistant I or II who is actively employed in either of such jobs as of the effective date of this Decree and who had at least two years service in either one or both of such job classifications as of October 4, 1989 will be reclassified as an Engineering Assistant III within 30 days of the effective date of this Decree and will be paid at the rate which would have now been applicable if they had

become an Engineering Assistant III on the fifth (5th) anniversary of their entrance into the Engineering Assistant I or II job classification, whichever occurred earliest.

22. In the event that minimum qualifications for engineering classifications are defined in terms of years of service in other classifications, and in the event that prior experience is scored according to periods of incumbency in other classifications, the following will apply:

(a) All periods after the 5th year of service as an EA I and/or EA II will be deemed to be service as an EA III.

(b) All years of service after the 8th year of service as an EA at any level will be deemed to be service as a CE I.

(c) All years of service after the 10th year of service as an EA at any level will be deemed to be service as a CE II.

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ARTICLE TWELVE
SPECIAL PROCEDURE FOR APPOINTMENT
OF ENGINEERS

ENTIRE ARTICLE PENDING COURT APPROVAL

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ARTICLE THIRTEEN
ENGINEERING JOB CLASSES

1. Limit on the use of EIT status:

(a) On and after the effective date of the Consent Decree, EIT status and any associated tests will not be utilized as a prerequisite for the job of GCE.

(b) After the goals provided by the Consent Decree for the GCE job have been achieved, then in evaluating eligibles certified to it for the GCE job, the Highway Department may consider EIT status as a factor in the selection process but may not appoint a white applicant in preference to a black applicant based solely on EIT status.

(c) Personnel will not utilize the EIT for scoring, ranking or certifying applicants for the position of GCE.

2. GCE job:

(a) The position of GCE will not be reduced in status, pay or importance from what it has been in the past.

(b) The GCE job will continue to be used as the entry level job for the PCE line of progression.

(c) The GCE job will also be expanded to an advanced entry level position for the CE line of progression.

(d) The number of GCE's during the term of the Consent Decree will not be less than the average number per year of GCE's between January 1, 1983 and January 1, 1993.

3. State registration:

(a) Certification by the State Board of Registration as a Registered Professional Civil Engineer will continue to be a prerequisite for the PCE and GRE jobs. It will not be a prerequisite for any CE or GCE job.

(b) The PCE job will not be used excessively by the Highway Department in the assignment of employees to the in-house job titles which have been filled by both employees in the PCE job and in the CE job.

(c) The Highway Department will not make appointments from PCE Registers or use the PCE job as the source for assignments for in-house job titles for the purpose of avoiding compliance with any provision of this Decree.

(d) In the case of Highway employees who have taken but failed to pass the State Board examination for Registered Professional Civil Engineer or who are eligible to take such State Board examination, Highway will develop a special training program aimed at preparing them to take or retake the State Board examination.

4. Offers of reclassification of incumbent employees to GCE: ***PENDING COURT APPROVAL***:

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5. Offers of employment in the GCE job:

(a) The following persons (if they have Civil Engineering or Civil Engineering Technology degrees) will be offered employment in the GCE job or in the job they would now hold with the Highway Department in the absence of the EIT and associated requirements (including the recency of degree requirement), whichever is higher, with the following credited service dates:

	CREDITED SERVICE DATE
Alfedo Acoff	March 30, 1983
Peggy Vonsherrie Allen	March 30, 1983
Christopher Zaubuike	March 30, 1983
Jeffery W. Brown	March 30, 1983
Willie F. Franklin	March 30, 1983
Macon Hinton	March 30, 1983
Wayne M. Leonard	March 30, 1983
Ronald D. Newsome	March 30, 1983
Adenrele Odutola	March 30, 1983
Rickey Richardson	March 30, 1983

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(b) Up to a maximum of 10 persons, plus one replacement for each person named in Paragraph 5(a) who is not appointed for any reason, black persons (if they have Civil Engineering or Civil Engineering Technology degrees) will (subject to availability) be appointed to the GCE job or the job they would now hold with the Highway Department in the absence of the EIT and associated requirements (including the recency of degree requirement), whichever is higher, provided that they satisfy the following conditions:

(i) They applied during the period since the EIT requirement was adopted for the GCE job or they would have applied for the GCE job but for the EIT requirement, and

(ii) They were or would have been rejected because of not having EIT status, or other associated characteristics (including, but not limited to passing the FOE test and satisfying the recency of degree requirement) and

(iii) They had degrees in Civil Engineering and Civil Engineering Technology at the time they applied or would have applied, and

(iv) They would have been certified-out for GCE in the absence of their rejection for lack of EIT status or other associated characteristics as defined above.

(c) The credited service date of such of the persons specified in Paragraph 5(b) above as accept such offers will be agreed to by the parties before notice of the offer of employment is given to them, subject to the following:

(i) No such credited service date shall be earlier than March 30, 1983.

(ii) The standard for determining such service dates will be the approximate date each such person would have been appointed in the absence of the EIT and associated requirements

(d) The maximum number of persons provided for by Paragraph 5(a) and Paragraph 5(b) together is 20.

(e) The State Personnel Department agrees to accept the appointment by the State Highway Department of such persons named or specified in Paragraphs 5(a) and 5(b) above as accept such offer, notwithstanding the inconsistency of such appointment (if any) with the Alabama Merit System Act.

(f) ***PENDING COURT APPROVAL:***

6. Jobs for appointments pursuant to Paragraph 5:

The job or jobs which the persons to be appointed pursuant to Paragraph 5 will be offered will be agreed to by the parties before notice of the offer of employment is given to them, subject to the following:

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(a) For such persons as have a registration with the Alabama State Board of Registration as a Registered Professional Civil Engineer as of the effective date of this Decree, the job to be offered will not be lower than GRE or higher than PCE-2.

(b) For such persons as do not have such registration, the job to be offered will not be lower than GCE or higher than CE-5.

7. Mechanics for the Paragraph 5 offers:

(a) Within 45 days following the effective date of this Decree and agreement on the job or jobs to be offered, the Highway Department will offer appointments to each of the persons named in Paragraph 5(a) above.

(b) The offers of employment provided for herein will be made by United States mail, addressed to the last known addresses of the persons listed in Paragraph 5(a) above (a) as set forth in the records of the State Personnel Department or (b) as provided to the State Highway Department and the State Personnel Department by the attorneys for the plaintiffs based on any search or research they may wish to engage in to locate such persons provided any address or address is to be provided to the State Highway Department and the State Personnel Department within forty (40) days following the effective date of this Settlement Decree and agreement on the job or jobs to be offered. There will be no responsibility on any defendant to locate or to attempt to locate any of such persons.

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(c) Such offers of appointment will include a designation for the use of such persons in accepting or declining the offers. There will be no option other than the options of accepting the offer or declining the offer. The offers must be accepted within such thirty (30) days following the mailing of the offers. Anyone who does not respond to the offer within such 30 day period will be deemed to have declined the offer.

(d) The offers of appointments provided for herein will remain open for a period of thirty (30) days following the mailing of the offers. Any and all offers of employment not accepted in writing by the offeree shall expire and have no further force or effect following such thirty (30) day period.

(e) Such of the persons named in Paragraph 5(a) of this Article as accept the offers of employment and are employed at the State Highway Department pursuant to Paragraph 5 of this Article will be credited with employment date service as of March 30, 1983 for purposes of their starting salary level in the job. It is the intention of this provision that such of the persons named in Paragraph 5(a) as are appointed pursuant to Paragraph 5 of this Article of the Settlement Decree will have their starting salary upon such employment equal to the average of the current salaries of the persons in the Graduate Civil Engineer job who started in such job on or about March 30, 1983.

(f) The employment of any of such persons named in Paragraph 5(a) above shall not result in the

displacement of anyone from any job, position, assignment, location, or shift and shall not result in the displacement of anyone from any section or bureau or division or district or office.

8. Notice to recruitment sources: The Highway Department will notify all recruitment sources, including colleges with Civil Engineering and Civil Engineering Technology programs at which the Highway Department recruits for Engineers, that EIT status, associated tests, and the recency of degree requirement has been discontinued as a prerequisite for the GCE job.

9. Newspaper notice: The Highway Department will place a notice advising that EIT status and associated characteristics, including the FOE test and the recency of degree requirement, has been discontinued as a prerequisite for the GCE job in newspapers of general circulation and special circulation in black communities and will otherwise adequately publicize such changes in the electronic media in the following cities:

— Montgomery

— Birmingham

— Mobile

— Tuscaloosa

— Auburn

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— Huntsville

— Dothan

— Tri-Cities Area

— Gadsden

— Anniston

— Alexander City

— Troy

— Grove Hill

Such notices and publicity shall invite black engineers to apply for employment with the SHD through the SPD. Notices and publicity in the print media shall consist at, a minimum, of quarter 1/8 page advertisements designed to reach the maximum number of readers. Notices and publicity in the electronic media will be designed and placed in the most advantageous manner for achieving the attention of the public.

10. Notice to applicants for GCE rejected because of the EIT requirement:

(a) To the extent it is able to do so, the Personnel Department will provide to the Highway Department the names and last known addresses for all black persons with degrees in Civil Engineering and Civil Engineering

Technology who applied for the GCE job and were rejected because of not having EIT status or any associated characteristics as defined above. The Highway Department shall make reasonable efforts to identify the names and last known addresses of all black persons with degrees in Civil Engineering and Civil Engineering Technology from the colleges and universities which it will recruit under the terms of this Consent Decree.

(b) The Highway Department will in turn give notice to such persons by certified mail, addressed to them at their last known address, advising them of the discontinuance of EIT status and associated characteristics as a prerequisite for the GCE job and enclosing a blank application form so they can if they wish reapply with Personnel for the GCE job.

(c) Those who reapply and are certified-out by the Personnel Department to the Highway Department for the GCE job will be offered employment by the Highway Department in the GCE job, assuming they satisfy the qualification standards of the job and, if they did not apply for the GCE job in the past, can show a reasonable probability that they would have applied in the absence of the EIT or associated requirements, including, but not limited to, the FOE exam and the recency of degree requirement.

(d) Those not offered employment and hired in accordance with Paragraph (c) above would remain on the register under the conditions of the Register Purging provisions above.

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11. Age Restrictions: The defendants will not utilize any criteria or selection procedure in relation to black applicants which has the purpose or effect of preferring scoring, ranking or restricting eligibility of black applicants because of the date of their education, their age or any other item related to time or age which may perpetuate past patterns of underutilization of black applicants.

ARTICLE FOURTEEN
SELECTION PROCEDURES

1. No new or more demanding standards:

(a) Black applicants and employees will not be subjected to employment criteria or procedures for hiring or promotion that are more difficult or demanding than those applied to white employees in the period since January 1, 1979 unless such more difficult or demanding criteria or procedure is shown by Highway to satisfy and be valid within the meaning of the Uniform Guidelines on Employee Selection Procedures.

(b) This does not mean that the job performance of black employees could not be evaluated by the revised Performance Appraisal procedure in effect or any future revision.

2. Assignment of duties:

(a) To the extent practicable, the duties and responsibilities of higher classified jobs will be assigned on a proportionately equal basis to black employees compared with white employees in the same lower classified jobs.

(b) The Highway Department will to the extent practicable not assign duties in such a way that any employee will gain an advantage in promotions, including reclassification, over other employees in the same classification.

3. Job duties which better prepare employees:

(a) Within 90 days following the effective date of this Settlement Decree, the Highway Department and the Personnel Department will identify the job assignments or duties within a job classification which would better prepare an employee for examination or promotion (including reclassification) than other assignments or duties within such classification.

(b) The assignments and duties identified will include, but not be limited to, any assignment or duty which would receive a greater value or number of points in a T & E rating, a classification or pay review, or in selection from a COE.

(c) For each assignment or duty so identified, the Highway Department will, to the extent practicable, develop a means for assuring that employees on the job are periodically rotated into such assignments and duties and that black employees are assigned to such duties and assignments at rates proportional to their representation in the job classification.

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ARTICLE FIFTEEN
RECLASSIFICATION AND REALLOCATION

1. Reclassification program: Following the effective date of this Decree, the following steps will be taken:

(a) All employees then working for the Highway Department in the classified service will be provided with a Form 40 on which they may list the job duties which they are performing and the percentage of time spent on each such job duty. Such filled-out Form 40's will be subject to review and approval or revision by such employee's supervisor or supervisors. Any disagreement will be resolved by a job study analysis by the Personnel Department, subject to challenge by plaintiffs' counsel.

(b) To the extent that such completed Form 40's establish that the subject employee is spending a majority of their working time in the performance of the duties and responsibilities of a higher job classification, or is spending an amount of time on such duties and responsibilities substantially equal to that of a majority of incumbents in such higher job classification, the Highway Department will request the Personnel Department to reclassify such employee to the higher job which is most appropriate for the duties and responsibilities on which the employee is spending a majority of his or her working time, and the Personnel Department will approve such request if such request is consistent with the findings of Personnel's classification review and its classification plan.

(c) Laborers who are working at the Highway may utilize the procedure described in Paragraph 1(a) above to obtain permanent status in the appropriate merit system classification after completion of one year of satisfactory service.

(d) All Laborers who are actively employed and have successfully performed the position of Laborer for one year as of the effective date of this Decree shall be reclassified to the HMT or EA position which is most similar to the duties they have performed as a Laborer on a regular basis.

(e) In the future, all Laborers who have successfully performed the position of Laborer for one year shall be reclassified to the HMT or EA position which is most similar to the duties they have performed as a Laborer on a regular basis.

(f) Nothing contained in this Paragraph 1 will apply to seasonal Laborers.

2. Limit on filling jobs by reallocation: A permanent opening in a classification may not be filled by reallocation when a black eligible is on the register for the class to which the position is being reallocated and such black eligible is (a) ranked higher or tied on the Register with the person to be reallocated or (b) would appear on a COE form from that Register if the person to be reallocated were ranked first on the COE.

3. Multi-Grade Jobs: The following steps will be taken by the defendants:

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(a) A job classification study will be conducted by the State Personnel Department encompassing the job classifications at Highway in a multi-grade series. Such study will commence with the following multi-grade jobs:

— Engineering Assistants

— Civil Engineers

— Professional Civil Engineers

— Highway Maintenance Technicians and Highway Maintenance Superintendent

— Right-of-Way Specialists

— Project Cost Auditors

(b) In the event such job classification study discloses that existing distinctions in the levels of multi-grade jobs do not reflect actual differences in duties, responsibilities, or qualifications, the jobs will be collapsed or restructured so that (i) they will reflect the actual distinctions, if any, shown by the study and (ii) are capable of being administered and utilized so that only persons occupying that classification perform the duties associated with it on a regular or non-emergency basis.

(c) Any restructuring of multi-grade jobs will likely involve reducing the number of grades and broadening

the pay ranges within the newly defined classification[s]. Such restructuring shall be implemented in a way that the opportunities for black employees to advance, and for the defendants to achieve the goals and purposes of this Decree, are enhanced and not diminished.

(d) In the event that the study results in the consolidation of classes (e.g., HMT-1 and HMT-2), all persons will be assigned to pay ranges appropriate to their years of service, provided that black employees shall not be downgraded or have a reduction in pay as a result of the reclassification study unless it is demonstrated by the Highway Department that they have not performed after being given the opportunity to do so, and are not capable of performing with reasonable training, the duties and responsibilities of the job classification to which they are assigned.

4. Duties within the job description: The Highway Department will monitor the duties and responsibilities performed by employees with the goal of assuring to the extent practicable that at least 90% of the duties and responsibilities performed by employees on a regular or non-emergency basis are within the job description for job they are holding.

ARTICLE SIXTEEN
TRAINING

1. Temporary special training program: During the first calendar year following the effective date of the Settlement Decree, the Highway Department will develop and provide

to all black employees a temporary special affirmative action training program with the goal of assisting such employees in progressing in career paths within the Highway Department. Such program will be provided again during the years 1997 and 1999.

2. Regular Training Courses: During the term of this Settlement Decree, the State Highway Department will offer training courses to employees subject to and in accordance with the provisions of the following subsections:

(a) The employees to whom such training courses will be offered will be all Highway Department employees who are working, during the calendar year in which the courses are offered, on a merit system job and have worked at least 540 hours of work during such year or the prior year on such job; provided, however, that Laborers will be treated the same as all HMT's for purposes of eligibility for such training courses.

(b) The training courses to be offered to such employees are set forth in the attached Appendix __ to this Settlement Decree and a course or courses designed to clarify and update black employees on the procedures to be followed and qualifications, training, and experience to be credited in filling higher classified jobs within the Highway Department.

(c) The Highway Department will monitor the enrollment of employees taking training courses in order to ensure to the extent practicable that interested black employees are receiving their fair share of participation in such training courses.

(d) The training courses to be offered pursuant to the Training section of the Settlement Decree will be started within 120 days after the effective date of the Settlement Decree and thereafter will be offered on an annual basis.

3. The training courses provided for by this Article will be offered to the employees eligible therefore, with such employees having the option to accept or decline the training courses. Offers and declinations of training opportunities shall be documented in writing and signed by the affected employee.

ARTICLE SEVENTEEN
POLICY AGAINST RACIAL HARASSMENT

1. Policy: The Policy Against Racial Harassment promulgated by the Highway Director in October 1992 will remain in effect. Such policy will be disseminated to employees by being posted on bulletin boards customarily used for notices to employees.

2. Training: The Highway Department will develop and implement a training program to educate all employees on the laws of the United States regarding EEO and the policy of the Highway Department against racial harassment. Such training will include a training course in the policy against racial harassment modelled on the Highway Department's training course in the policy against sexual harassment.

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ARTICLE EIGHTEEN
RELATIVES

1. No preference will be given to any known relative of any current State Highway Department employee.

2. It is recognized that while the employment of relatives is not in and of itself unlawful, the giving of preference to relatives can under certain circumstances constitute a violation of Title VII of the Civil Rights Act. Accordingly, the State Highway Department shall monitor and to the extent practicable identify persons who are related to current employees of the State Highway Department to ensure that no person is shown preference in hiring or promotion within State Highway Department by reason of being a known relative of a current employee of the State Highway Department. In those cases where a relative of an employee of the State Highway Department is employed or promoted, the State Highway Department will maintain such records as are necessary to document the basis for the non-hiring or non-promotion of any black applicants who are equally qualified for the position or the promotion.

ARTICLE NINETEEN
GENERAL

1. Frazer/Ballard: Defendants remain bound by the injunctive and declaratory relief entered in *U.S. v. Frazer* (now *Ballard*).

2. EEO Monitor: Within 90 days following the effective date of the Settlement Decree, the Highway Department will

assign a qualified employee answerable directly to the Highway Director and stationed in Montgomery, whose primary responsibilities will consist of (a) monitoring compliance with the terms of the Settlement Decree, and (b) assisting both the Highway Department and the Personnel Department in carrying out the terms of the Settlement Decree. The person to be assigned as the EEO Monitor pursuant to this Paragraph 2 is Ron Green. In the event Mr. Green is unable or unavailable to continue to serve in this position at any time during the term of this Decree, the Highway Department will consult with the plaintiffs' attorney concerning his replacement.

3. EEO Program: The Highway Department's Equal Employment Opportunity Program will be enhanced and administered in a manner agreed between the parties.

4. Reports: The Highway Department and the Personnel Department will make quarterly reports on their efforts to comply with the Settlement Decree in the format set forth in the attached Appendix __. Such reports will be filed with the Court with a copy to plaintiffs' counsel. Such reports will be filed throughout the duration of this Decree to December 31, 2000, provided that if all or any part of this Decree is extended, the plaintiffs will have the right to petition the Court to extend the reports.

5. Records: The Highway Department and the Personnel Department will permanently retain all records concerning the implementation of the Consent Decree for a period of 5 years following the expiration date of the Consent Decree. Such records would be available to plaintiffs' counsel for inspection and copying for a period of 5 years following the expiration date of the Settlement Decree.

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6. Monitoring:

(a) Plaintiffs' counsel will be entitled to contact and request information from the Highway Department and Personnel Department during the term of the Settlement Decree to monitor their compliance with the terms of the Decree, and the Defendants will comply with such requests to the extent reasonable. All requests relating to the development and implementation of policies, procedures, systems, rules, appointments, studies shall be deemed reasonable. Such requests are to be in writing with copies thereof to counsel for the defendants. The plaintiffs' counsel shall have the right to review the efforts at compliance and implementation of this Decree and shall be furnished with the information necessary to such review upon request. The defendants will consider in good faith the comments of the plaintiffs' counsel.

(b) Any provision of this Decree which provides for a right of plaintiffs' counsel to review and comment on efforts at compliance or implementation shall be subject to challenge by the plaintiffs'.

(c) The parties will have the right to seek to enforce the provisions of this Decree by filing motions with the Court. The provisions of this Decree, and the issues challenged in the case, have been premised upon the existence of the prior remedies ordered in the *Frazer/ Ballard* case and, to the extent that any future acts or omissions violate the remedies ordered in *Frazer/ Ballard*, the plaintiffs will be entitled to enforce such remedies in this case in the same way that they are

entitled to enforce the remedies of any other provision of this Decree.

(d) It is the intent and purpose of this Decree to undo the effects of the past practices which have been the subject of this case and Decree and to prevent further practices which may perpetuate such efforts or otherwise discriminate against the plaintiffs or the class they represent. To the extent that this Decree fails to achieve the intent and purpose for which it has been entered, the parties may seek further relief from the Court.

(e) Plaintiffs' counsel will be entitled to reasonable costs and fees for monitoring compliance with the Settlement Decree, including any expert witness fees. Plaintiffs' counsel will provide documentation of the number of hours spent, the functions performed, and the costs incurred on a quarterly basis. Subject only to the accuracy of such documentation and the reasonableness of the amount requested, the requested amount would be paid within 30 days of submission. For routine monitoring, but not for the resolution of disputes, the maximum caps will be $10,000 per year for attorneys' fees, expenses and costs and $5,000 per year for expert witness fees, expenses, and costs. Amounts of fees within the limits of such caps will not be contestable by the defendants. The term "costs" will include normal billable expenses, including expert witness fees, as provided under the Civil Rights Act of 1991. Disputes will be resolved by the Court.

(f) The plaintiffs' attorney will have the right to petition the Court to extend this Paragraph 6 and any or all sub-paragraphs thereof beyond December 31, 2000.

7. *Complaint procedure*: Within 180 days of the effective date of this Decree, the Highway Department will develop and implement an enhanced complaint procedure which assures that all discrimination complaints are processed without fear and reprisal within established time limits and that appropriate action is taken following decisions. Such procedure will be submitted to plaintiffs' counsel for review and comment at least 30 days prior to its implementation.

8. No reference in this Decree to existing job classes or job groupings will be construed to restrict Defendants' ability to modify or abolish such classes or groupings, provided that the plaintiffs will be given prior notice and the opportunity to object and to seek Court review in this action prior to implementation of such changes.

9. In developing validation efforts directed to minimum qualifications or examinations, and in developing revised examination announcements, Personnel will (a) document its efforts in writing, (b) consult with the attorney for the plaintiff class regarding the selection of its psychologists and (c) consult with the attorney for the plaintiff class and any psychologist or other expert designated by such attorney for such purposes. Prior to implementing the results of such efforts, Personnel will make the documentation of its projects available for review and comment by plaintiffs' attorney and consultants.

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10. Duration: The duration of the Consent Decree is December 31, 2000. The Court retains jurisdiction to decide any and all questions or disputes which arise under this Decree during such period or any extension period. The plaintiffs will have the right to seek extension of the duration of the Consent Decree.

11. Notice of the proposed settlement: The provisions of the Civil Rights Act of 1991 will govern with respect to notice and objections and hearing concerning the Settlement Decree.

12. Effective date: The phrase "the effective date of the Settlement Decree" means the date 35 days following the final approval of the Settlement Decree by the Court.

13. Except to the extent expressly provided otherwise, all of the terms and provisions of this Decree shall operate prospectively only beginning with the effective date of the Decree.

14. ***PENDING COURTAPPROVAL***:

15. ***PENDING COURTAPPROVAL***:

16. Subject to the provisions of this Decree permitting or requiring further proceedings, including but not limited to, Articles 20 and 21, this Decree constitutes full and complete relief on all claims, causes of action, and allegations which have been asserted in this action.

17. All parties agree and stipulate that there will be no appeal from this Consent Decree or from any ruling, order,

or decision entered by the Court in the case relating to any issue or subject encompassed within the terms of this Decree. Nothing herein shall prohibit the non-class employees or any other person not a party to this Decree from having the right to appeal any interpretation, ruling, decision or order.

18. The State Highway Department and the State Personnel Department will continue to comply with all laws and regulations applicable to equal opportunity in employment.

19. Nothing in this Consent Decree shall be construed to permit the defendants to violate any law or regulations. In particular, the State Highway Department and the State Personnel Department remain obligated to follow Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, all applicable Federal regulations, and all applicable Court orders with respect to all employment practices except as otherwise set forth hereinabove.

ARTICLE TWENTY
FURTHER PROCEEDINGS REGARDING CLASS MEMBERS

1. Further negotiations and proceedings are required to resolve the claims for monetary and non-monetary remedies for individual members of the class (including the named plaintiffs and intervenors), provided however, that this Decree does not in and of itself entitled any such class member to such remedies. Such claims shall be resolved first by settlement negotiations and then, to the extent not resolved by settlement negotiations, by the Court.

2. The parties will make all reasonable efforts to resolve all such claims of the members of the class (including the named plaintiffs and intervenors) according to a schedule to be mutually agreed upon within 10 days after preliminary approval of this Decree by the Court or, in the event the parties cannot mutually agree on such schedule within such 10 day period, the Court will enter an Order embodying a schedule. Regardless of whether the schedule is mutually agreed upon by the parties or embodied in an Order entered by the Court, such schedule shall contain specific deadlines for the exchange of information and for offers and counter-offers to enable settlement negotiations on such claims to take place within 90 days after the effective date of this Consent Decree and, in the event such settlement cannot be achieved, for trial on that phase of the case to commence no later than 180 days after the effective date of this Decree.

3. Such schedule shall be presented to the Court for approval or modification, and once finalized shall be entered as an Order of the Court. In the absence of agreement on such schedule within 10 days of the preliminary approval of this Decree, the Court will enter its own schedule aimed at settlement negotiations taking place within 90 days after the effective date of this Decree and scheduling that phase of the trial of this case to commence no later than 180 days after the effective date of this Decree.

ARTICLE TWENTY-ONE
ATTORNEYS' FEES

1. The parties will endeavor to reach agreement on the amount of attorneys' fees, costs, and expenses for services and expenses up to the then current date.

2. If the parties have been unable to agree upon the amount of interim fees and expenses before the effective date of this Decree, the plaintiffs will submit their claim for fees to the defendants within three days of the effective date of this Decree and, within twenty-one days (21) thereafter, the defendants shall in good faith stipulate to the amount of such fees and expenses which they would urge the District Court to find to be reasonable and shall pay such uncontested sum to the plaintiffs' attorneys within thirty (30) days of the effective date of this Decree or at such other time as is mutually agreed to. As to any remaining sums claimed by the plaintiffs' counsel for fees and expenses, the defendants will, within twenty-one (21) days of receipt of plaintiffs' claim for fees, identify the hours they contest as unreasonable or otherwise not awardable with a short statement of the basis for each such contention, identify the hourly rate for each attorney representing the plaintiff which it would stipulate to be reasonable and urge the District Court to adopt, identify any other contentions which it would make regarding the amount of fee which should be awarded to each attorney appearing on behalf of the plaintiffs and identify any expense items which it contests as unreasonable or non-reimbursable with a short statement of the basis for each such contention. In the event that the fees and expenses must be determined by the Court, the parties stipulate that the proposed Consent Decree, if adopted by the Court, constitutes full relief on all claims asserted in this action and that the plaintiffs are the prevailing party as to all issues and claims in this lawsuit. In the event that the Court must determine the amount of fees and expenses, the parties will in good faith attempt to stipulate to the following items: (a) the reasonable hourly rate which should be paid for the services of each attorney

representing the plaintiffs; (b) the reasonable number of hours expended by each such attorney on behalf of the plaintiffs; (c) the reasonable amount of expenses incurred on behalf of the plaintiffs that should be reimbursed by the defendants. The class counsel (the law firm of Gordon, Silberman, Wiggins & Childs) shall be entitled to reasonable fees and expenses for work done after the preliminary approval of the Decree on behalf of the plaintiffs and the plaintiff class. If agreement cannot be reached, the amount of attorneys' fees and expenses will be resolved by the Court as soon as practicable (from the Court's standpoint). The Civil Rights Act of 1991 will govern with respect to allowable costs and expenses.

DONE and ORDERED this the 16th day of March, 1994.

s/ Myron H. Thompson
MYRON H. THOMPSON
CHIEF JUDGE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
ALABAMA

APPENDIX K — ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION DATED AND FILED APRIL 24, 1998

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

CIVIL ACTION NO. 85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

ALABAMA DEPARTMENT OF
TRANSPORTATION, et al.,

Defendants.

ORDER

By order entered February 9 , 1994, the court allowed the Adams intervenors — several 'non-class-member employees,' that is, persons who are employees of the Transportation Department, but who are not members of the plaintiff class of African-Americans — to intervene in this litigation.[1] The intervention was limited to the right to

1. *See Reynolds v. Roberts*, 846 F. Supp. 948, 950 (M.D. Ala. 1994) (Doc. no. 520).

"challenge the race-conscious provisions of the proposed consent decree."[2] The matter is now before the court on the defendants' motion for certification of a class of non-black merit system employees to be represented by the Adams intervenors.[3] For the reasons that follow, the motion will be granted, although with the understanding that the class representation will be limited to the purpose of intervention — to challenge the race-conscious provisions of the proposed consent decree.

The defendants seek certification of an intervenor class pursuant to Rule 23(a) & (b)(2) of the Federal Rules of Civil Procedure. Rule 23(a) & (b)(2) contains five requirements for class certification. First, the class must be "so numerous that joinder of all members is impracticable." Rule 23(a)(1). Second, there must be questions of law or fact common to the class. Rule 23(a)(2). Third, the claims or defenses of the representative parties must be typical of the claims or defenses of the class. Rule 23(a)(3). These second and third requirements "tend to merge" and are therefore usually considered together. *General Tel. Co. of the S.W. v. Falcon*,

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2. *Id.* at 954. The proposed consent decree was divided into three parts, now known as 'consent decree I,' 'consent decree II,' and 'consent decree III.' Consent decree I was approved, *see Reynolds v. Alabama Dep't of Transp.*, 1994 WL 899259 (M.D. Ala. Mar. 16, 1994) (Doc. no. 553), and part of consent decree II was approved. *See Reynolds v. Alabama Dep't of Transp.*, __ F. Supp. __, 1998 WL 32182 (M.D. Ala. Jan. 23, 1998) (Doc. no. 2413). The remainder of consent decree II and all of consent decree III are still under submission with the court.

3. Motion for certification of intervenor class, filed November 25, 1996 (Doc. no. 1350).

457 U.S. 147, 157 n.13, 102 S. Ct. 2364, 2371 n.13 (1982). They serve as "guideposts for determining whether under the particular circumstances maintenance of a class action is economical" and whether the named party's claims or defenses and those of the class are "so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.* Fourth, it must be shown that "the representative parties will fairly and adequately protect the interest of the class." Rule 23(a)(4). Fifth and finally, the "party opposing the class" must have "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Rule 23(b)(2).

As to the numerosity requirement, "the proper focus is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors." *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1022 (5th Cir. February 23, 1981).[4] The term "impractical" in the Rule does not mean "impossible"; rather, the movant need only show that "it is extremely difficult or inconvenient to join all the members of the class." 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1762, at 159 (2d ed. 1986). The record reflects that the Adams intervenors class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

4. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

The class also meets the commonality and typicality requirements. The class seeks, and will be allowed to challenge the race-conscious provisions of the proposed consent decree. In addition, "the representative parties will fairly and adequately protect the interest of the class." Rule 23(a)(4). Finally, those acting in opposition to the class have "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Rule 23(b)(2).

Accordingly, it is ORDERED as follows:

(1) The defendants' motion for certification of intervenor class, filed November 25, 1996 (Doc. no. 1350), is granted.

(2) A class consisting of all non-black merit system employees of the Alabama Department of Transportation is certified as an intervenor class, to be represented by intervenors William Adams, Cheryl Caine, Tim Colquett, William Flowers, Wilson Folmar, George Kyser, Becky Pollard, Ronnie Pouncey, Terry Robinson, and Tim Williams.

(3) The representation will be limited to the purpose for intervention, that is, to challenge the race-conscious provisions of the proposed consent decree.

DONE, this the 24th day of April, 1998.

s/ Myron H. Thompson
UNITED STATES DISTRICT
JUDGE

APPENDIX L— AFFIDAVIT OF PATRICK H. SIMS DATED JANUARY 18, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO.
85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

v.

G. M. ROBERTS, et al.,

Defendants.

AFFIDAVIT

STATE OF ALABAMA)

COUNTY OF MOBILE)

Patrick H. Sims, being first duly sworn, deposes and says:

1. My name is Patrick H. Sims and I one of the attorneys for the defendants in this action.

2. Since July of 1991, my law firm, Cabaniss, Johnston, Gardner, Dumas & O'Neal, has represented all of the defendants in this case. Though some of the claims made by

plaintiffs in the case are directed to all defendants, many of the claims are discretely focused on either the Highway Department defendants or the Personnel Department defendants. In order to manage the defense of the case as efficiently as possible, it was determined in July of 1991 that my partner William F. Gardner would have overall responsibility for the case but would focus primarily on those claims addressed to the Highway defendants. I would be responsible for the defense of those claims directed to the Personnel defendants. This allocation of labor continued in the pretrial, trial, and settlement phases of the case.

3. On behalf of the Personnel defendants, I participated in all discovery addressed to those defendants, conducted investigations and interviews within the Personnel department regarding plaintiffs' claims, evaluated the exhibits tendered by the plaintiffs relevant to those claims, and fully participated in the trial of this action as the representative of the Personnel defendants. I am, I believe, as fully informed as anyone regarding the claims being asserted against the Personnel defendants, the evidence regarding those claims, the Court's reaction during trial to that evidence, and the legal framework within which the claims are being asserted and must be defended.

4. The trial of this case began in June of 1992 and continued, with some interruptions, into December of 1992. Mr. Frank Ussery, legal counsel to the Personnel Department, attended some trial proceedings, and at the end of each trial day I gave him a report on the day's testimony. I also gave periodic oral reports to Dr. Halycon V. Ballard, the State Personnel Director, regarding the progress of the trial and the nature of the evidence being presented.

5. When the trial recessed in December of 1992, the lawyers had some discussions regarding the possibilities of exploring settlement, and the lawyers requested Judge Thompson to delay resumption of the trial so that settlement might be pursued. Sometime in January of 1993, Mr. Gardner and I received a letter from Mr. Robert Wiggins, counsel for the plaintiff class, setting out broadly plaintiffs' initial settlement demand with respect to "structural" issues — that is, changes in the operating procedures at the Personnel Department and the Highway Department which plaintiffs demanded. I forwarded this letter to Mr. Ussery for distribution within the Personnel Department.

On January 28, 1993, I met with the entirety of the senior management of the Personnel Department to discuss plaintiffs' proposal. The participants in that meeting, other than myself, included the following: Dr. Halycon V. Ballard, State Personnel Director; Mr. Tommy Flowers, Deputy Director; Mr. Frank Ussery, legal counsel; Mr. Douglas Lunsford, Chief of the examination division; Mr. Paul Thomas, Chief of the certification division; Mr. Vance Brown, Chief of the data processing division; and Dr. John Hicks, an industrial and organizational psychologist who now is Chief of the classification division.

6. At the meeting on January 28, 1993, and at all of the meetings discussed in the following paragraphs of this affidavit, there was a consensus among the Personnel officials regarding three basic principles that would control Personnel's approach to settlement. First, to the extent possible, the basic form of the state merit system ought to be maintained, and any deviation from the system ought to be

agreed to only where a more drastic deviation might be mandated by the Court. Any such deviation should be as limited as possible in scope and time. Second, Personnel should agree to make changes or take actions in connection with the settlement only to the extent that the staffing and other resources of the Personnel Department allowed. Third, any provision agreed to by Personnel should, unless the contrary was absolutely necessary, be race-neutral. The initial position of the Personnel defendants expressed in the meeting of January 28, 1993 was that Personnel would agree to nothing that was not race-neutral. As explained in succeeding paragraphs of this affidavit, Personnel's management receded from that position to some extent. As that recession occurred, the controlling precept became that race-conscious remedies should be agreed to only where (a) the evidence (and the Court's apparent attitude towards the evidence) and the law indicated that a more drastic race-conscious remedy might be imposed by the Court and (b) other remedial approaches that might have a lesser effect on the expectations of non-class members were fully explored.

7. In February of 1993, the first reasonably complete working draft of plaintiffs' settlement demand was constructed. During the next nine or ten months, though other work demands of the lawyers sometimes delayed the process, the lawyers continued to haggle over possible settlement of the structural issues. On at least three occasions during that period, I met with the management team described in paragraph 5 above to review current drafts of the proposal. Each of those meetings lasted a full work day and each followed the same basic format, described in the following paragraph.

8. Prior to each meeting, a draft agreement was given to each participant for review. Dr. Ballard presided at the meetings. The group would begin with the first paragraph on page one of the draft and continue, paragraph by paragraph, to review the entire content of the proposal. With respect to those provisions that would require changes in Personnel's procedures, the discussion proceeded differently with respect to two basic categories of proposals, discussed separately in the following two paragraphs.

9. With respect to those proposed changes that were race-neutral, the discussion was primarily logistical. Do we have the manpower to do this? If we make these changes, would it impact some other area of our operation? Is there some simpler way to accomplish what the plaintiffs want?

10. As to those proposals that would involve race-conscious changes, I usually led off the discussion by describing (a) the claims made by the plaintiff class that the remedy related to, (b) the evidence presented by the plaintiffs with respect to those claims, (c) the Court's apparent reaction to that evidence, (d) the evidence that Personnel or Highway would be in a position to present to rebut the plaintiffs', (e) my judgment as to who would win or lose on the claim, and (f) my judgment as to the remedy that might be imposed by the Court if plaintiffs prevailed. Typically there would then be extended discussion within the group regarding the specifics of the plaintiffs' proposal, including an identification of how the proposal would benefit the class members and burden non-class members. There would also typically be discussion of other remedial steps that might satisfy plaintiffs' basic demand, again with a review of the resulting benefits and burdens.

11. At the conclusion of each of my meetings with the management teams, I was given instructions regarding what in the latest draft was acceptable, what was unacceptable, and what counter proposals to make. I then had discussions with Mr. Wiggins in accordance with those instructions. Through that process, the final settlement agreement evolved, insofar as it relates to Personnel Department practices.

12. The race-conscious demand made by plaintiffs that was most strongly resisted by Personnel's management was the concept ultimately embodied in paragraph 19 of Article Eleven of the Decree, which provides, in essence, that in order to facilitate Highway's attainment of its hiring goals, Personnel would certify adequate numbers of black candidates from the Registers, notwithstanding the Rule of 10. This was essentially the last major provision agreed to by Personnel, and the agreement came after protracted discussion and evaluation. Among the related points discussed by Personnel's management were these:

a. The recruitment obligation imposed by the 1976 Decree in *United States v. Frazer* and the *prima facie* evidence of its violation presented in this case;

b. Evidence presented in this case that would allow the trial court to conclude that Highway had consciously avoided the recruiting and hiring obligations imposed by *United States v. Frazer* and its own affirmative action agreements with the Federal Highway Administration;

c. *Prima facie* statistical evidence of severe racial disparities in many job classifications utilized at Highway, particularly the engineering classifications;

Appendix L

d. *Prima facie* statistical evidence that many examinations utilized for Highway classes had racial disparate impact, evidence of arguable deficiencies in the validation process for such examinations, and Judge Thompson's inclination, demonstrated in other employment cases, to insist on all aspects of validation protocol, all of which led to a conclusion that a court judgment throwing out many examinations — and resulting Registers — was quite possible;

e. Given the entry of the *Frazer* Order in 1976, and the filing of this case in 1985, the negotiated life time of the goals provisions — 7 years — was relatively short;

f. The fact that the negotiated goals provisions amounted in fact to goals and not lockstep quotas;

g. The fact that under the goals provisions, only qualified applicants — that is, those who had been examined and placed on a Register — would be appointable and no incumbent could be displaced;

h. The fact that the goals provisions did not provide for automatic appointment of a black person added to the bottom of an expanded certificate of eligibles (that is, if a certificate of eligibles were lengthened to increase the number of blacks on the certificate, Highway retained the option to appoint higher-ranked whites, either those in the original 10 or those who were themselves added as a result of the expansion of the certificate;

i. The fact that the Rule of 10 has never been a guarantee of appointment, given that (i) under the Rule

of 10 Highway can hire (subject to the *Frazer* no bypass rule) any person from any rank on the certificate, (ii) the fact that for continuous registers, being in a reachable position on a register is transitory, lasting perhaps only until the next update of the register, and (iii) the fact that an applicant's being in a reachable position on a current a register lasts only until the register is abolished and a new register formed.

j. Evidence, in the form of hundreds of Highway certificates of eligibles produced in discovery, from which it could readily be inferred that there was no strong correlation between appointments and rank on certificates.

k. The fact that the real "expectancy" created by the Rule of 10 is not of appointment but of a numerically limited competitive field, and that paragraph 19 would preserve the appointment opportunity, with any diminished expectancy flowing from the expansion of the field;

l. The fact that in prior litigation in this court (*Alabama State Employees Association v. Frazer*, No. 76-424-N (Judgment of March 16, 1978)) , it was held that white persons who attain a high ranking on registers created through the use of unvalidated examinations had no legitimate protected interest in the then-existing Rule of 3, and thus had no "reverse discrimination" claim flowing from deviations from that Rule after the 1976 Decree in *United States v. Frazer*. Following evaluation of all those points, the Personnel management determined

that paragraph 19 way responsive to *prima facie* evidence presented at the trial, that it did not unreasonably undermine any legitimate expectations of non-class employees, and that any impact on those employees would be less than would probably occur under court-imposed remedies.

13. The other major provisions of the settlement agreement that are expressly race-conscious are Articles Twelve and Thirteen, dealing with a special hiring program for engineer classifications. Among the related factors considered by Personnel management in agreeing to those portions of the settlement were the following:

a. The evidence that the engineering classifications, particularly the civil engineer classes and the parallel progression line for registered engineers, consisting of the GRE and PCE classes, formed the central management corps of the Highway Department and were readily identifiable as the most important Highway classes;

b. The fact that in 1976 Highway and Personnel had been specifically ordered by this Court in *United States v. Frazer* to engage in intensive recruiting activities for civil engineers;

c. The high probability that the Court would conclude that the defendants failed to conduct any such recruitment;

d. The evidence presented at trial that most employees progressed to civil engineer from the

engineering assistant classes, that blacks were excluded from engineering assistant classes until 1977, and that after 1977, through a combination of experience requirements and register closures, the opportunities of blacks to get on the EA2 and EA3 registers were extremely limited, all of which led to a conclusion that the Court was likely to find that the defendants' actions had the purpose or effect (or both) of systematically excluding black persons from the civil engineer classes.

e. The likelihood that substantially all of the persons given the special appointments under Article Twelve would be incumbent engineering assistants who could make a direct personal claim of discrimination;

f. The likelihood that the Court would conclude that the EIT/FOE requirement for graduate civil engineer could not he justified as job-related, evidence from which the Court could conclude that the EIT/FOE requirement was imposed in response to the development of civil engineering programs at predominantly black schools such as Alabama A&M, and the disparate impact of the implementation of the EIT/FOE requirement on the then-existing register for GCE, all of which led to the likelihood of a conclusion by the Court that the black persons purged from the GCE register, who are the named beneficiaries of part of Article Thirteen, were the personal victims of intentional racial discrimination;

g. The related provisions of the Decree providing that the appointment under Articles Twelve and Thirteen count toward the goals set out in Article Eleven. Based

on the foregoing, it was concluded that the special appointment provisions of Articles Twelve and Thirteen would, as implemented, in large measure involve the provision of individualized remedies to persons who would quite likely be awarded such relief by the Court, and that though the implementation of those Articles might delay promotions for some non-class employees, the impact of that delay would likely be less than what would be experienced if the case proceeded to a litigated judgment.

s/ Patrick H. Sims
PATRICK H. SIMS

Sworn to and subscribed
before me this 18th
day of January,
1994.

s/ Rebecca R. Hulak
Notary Public
My Commission Expires: 4-20-94

APPENDIX M — AFFIDAVIT OF WILLIAM F. GARDNER DATED MARCH 6, 1994

IN THE
UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO.
85-T-665-N

JOHNNY REYNOLDS, et al.,

Plaintiffs,

CECIL PARKER, et al.,

Plaintiffs-Intervenors,

v.

ALABAMA HIGHWAY DEPARTMENT, et al.,

Defendants.

AFFIDAVIT OF WILLIAM F. GARDNER

STATE OF ALABAMA)

JEFFERSON COUNTY)

William F. Gardner, being first duly sworn, deposes and says as follows:

Appendix M

1. I am and have been representing the Alabama Highway Department (now known as the Alabama Department of Transportation) in this lawsuit since 1987. My role in the case has included taking depositions, defending depositions, consultation with expert witnesses, answering interrogatories and document production requests, propounding interrogatories and document production requests, interviews with witnesses, and review of documents. I prepared the case for trial when it was set in 1988 and settled on the Saturday afternoon before the Monday scheduled start of the trial, so I was at the stage of virtually complete trial preparation. I again prepared the case for trial when it was again set in 1992 and participated in the trial beginning in June 1992.

2. I participated in the negotiation and writing of the two proposed consent decrees which preceded the proposed Consent Decree presently before the Court for consideration. I similarly handled the negotiation and writing on behalf of the Department of Transportation of the current proposed Consent Decree.

3. Only for the purpose of establishing that I am familiar with employment law and trials, it is noted that I have been engaged in the practice of law for 35 years (as of this Summer), most of it in the employment field. I have tried more employment cases than I remember, including lawsuits under Title VII of the Civil Rights Act and 42 U.S.C. §§ 1981 and 1983. The cases I have tried have included *United States v. H.K. Porter Co.*, which I believe to have been the trial of the first pattern or practice Title VII lawsuit filed by the United States Department of Justice in the South.

4. I was personally involved in all phases of the process which produced the proposed Decree presently before the Court. My involvement included reviewing and revising proposed drafts prepared by class counsel, preparing counter-proposals on behalf of the Department of Transportation, preparing complete drafts incorporating the points on which tentative agreement had been reached and the respective positions on points on which no agreement had been reached, having lengthy negotiating sessions with class counsel (the last being on the same day the proposed Consent Decree was submitted to the Court), and meeting with officials of the Department of Transportation to inform them of the status of negotiations and to review the then current drafts of the proposed Consent Decree.

5. A decision to take the settlement road is not an easy one for any attorney. There is no more certain way for lawyers to become unpopular with their clients than to be perceived as lacking a "fighting spirit" or to recommend a settlement which is subjected to subsequent criticism. The practical reality is that cases which should be settled are at times tried to conclusion for no better reason than the consideration that it is easier to blame the Court or the jury for an unhappy outcome than it is to justify a settlement. At no time, therefore, did I recommend settlement with any lack of a willingness to try the case to conclusion.

6. There were several reasons for my firm conviction that the settlement embodied in the proposed Consent Decree was and is the best possible resolution of the issues from the standpoint of the Department of Transportation.

Appendix M

(a) I concluded during the many days the case was tried that the Court was going to rule against us on significant issues which have been resolved by the proposed Consent Decree. By settlement, therefore, the Department of Transportation has had a voice in the writing of employment procedures as opposed to being subjected to employment procedures established by Court Order. It is certainly true that the predicted adverse judgment by the Trial Court could have appealed, but it is equally true that the Court's findings on disputed factual issues would have gone up with the protection of the clearly erroneous rule.

(b) The attitude that it is easier to blame a Court for an adverse judgment than to justify a settlement was in my view responsible for the prolonged litigation of certain past civil rights cases in the Middle District of Alabama. The problem is that in a class action, an adverse judgment generally results in a permanent injunction, as illustrated by the continued controversy today regarding compliance with Judge Johnson's Order nearly a quarter of a century ago in *Frazer*. It is therefore vastly preferable to have a Consent Decree with a finite duration. I am well aware that when the expiration date of consent decrees are nearly in sight, it is common for plaintiffs to move to extend the expiration date. But for that procedure to succeed, there must be a sound reason for extending the duration of the decree, and even if the decree is extended, it is extended for a definite duration rather than indefinitely. The sum of it is that it was and is my opinion that the interests of the Department of Transportation would be better served by a Consent

Decree with a fixed duration period as opposed to the potential of a permanent injunction.

(c) This case was unusual in that it came into the courtroom carrying the weight, from the defense standpoint, of Judge Johnson's 1976 Order in *Frazer* and the Federal Highway Administration (FHWA) report in 1977-1978. We attempted to minimize the problems they created by taking the position they were too far removed in time to be relevant evidence and that the FHWA report was inadmissible hearsay. When we failed to prevail on those positions, the case was in the posture of the Department of Transportation laboring under the heavy burden of those events from the 1970's, which the plaintiffs effectively used at every opportunity during the trial.

7. It should be noted that I am not alone in the opinion that the interests of the Department of Transportation would best be served by settlement. The Court file tells us that before we came into this case in the Fall of 1987, the Court had been notified the case had been settled. The proposed Consent Decree now before the Court is therefore the fourth effort to settle this case, with the series of proposed but unsuccessful settlements being (a) pre-Fall 1987, (b) the 1988 settlement reached on Saturday before the scheduled Monday start of the trial, (c) the 1991 settlement which fell apart because of the substantial number of class members who elected the special opt-out procedure provided in 1991 (thus illustrating the reason for the principle that 23(b)(2) actions do not carry opt-out rights), and (d) the current settlement.

8. It is in my view accurate to say that the proposed Consent Decree presently before the Court was the product of the most that could have been obtained from class counsel. Only for the purpose of showing that this was not my first experience with negotiating, it should be said that over the course of the past 35 years I have negotiated collective bargaining agreements with unions and have negotiated pattern or practice settlements and consent decrees with the Department of Justice, the Equal Employment Opportunity Commission, all of the name partners in the Adams, Baker & Clemon law firm, and with class counsel in this case.

9. With respect to the goals provisions of the proposed Consent Decree, we preserved to the extent we were able to do so, the concept used in the failed 1988 and 1991 settlements of keying goals to certifications of eligibles or registers. It was not possible to obtain more in the way of concessions from class counsel than the provisions which are in the proposed Consent Decree.

s/ William F. Gardner
William F. Gardner

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Appendix M

Sworn to and subscribed before
me this 6th day of March, 1994.

s/ [illegible]
Notary Public
My Commission expires 9/3/97

No. 01-838

In The

Supreme Court of the United States

JOHNNY REYNOLDS, *et al.*,

Petitioners,

v.

G.M. ROBERTS, in his official capacity as Director of the Alabama Department of Transportation, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PAUL BOWLIN *et al.*

[Respondents Continued On Inside Cover]

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State Personnel Department, State of Alabama

State of Alabama

Donald Siegelman, in his official capacity as Governor of the State of Alabama

Ray Bass

Marvin Wagoner

Thomas G. Flowers, in his official capacity as Director of the State Personnel Department

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STATEMENT OF THE CASE

A. Proceedings in the District Court

1. Proceedings Leading to Consent Decree I

Six African-Americans brought this suit against Defendants/Respondents Alabama Department of Transportation ("ALDOT"), State Personnel Department ("SPD"), and various state officials (collectively "defendants") in May 1985, alleging that defendants had discriminated against them in their employment because of their race. Pet. App. 3a. In October 1986, the district court certified three plaintiff classes: (1) all black merit system employees of ALDOT employed at any time since May 21, 1979; (2) all black non-merit system employees of ALDOT who had unsuccessfully applied for merit system employment since May 21, 1979; and (3) all black non-employees who had unsuccessfully applied for merit system employment since May 21, 1979. Pet. App. 3a n.2. The district court later combined classes two and three.

Although the parties reached a full settlement of the case in both 1988 and again in 1991, the district court refused to approve the first proposed settlement, and the second settlement collapsed after a large number of class members opted out and defendants exercised their right to withdraw. Pet. App. 4a. In June 1992, the case proceeded to trial before the district court. *Id.* After several months of trial, but before plaintiffs rested, the court granted the parties' request for an indefinite recess for the purpose of settlement negotiations. In November 1993, the parties reached a partial settlement and presented a proposed consent decree to the court, which provided for broad classwide relief, but left monetary

and non-monetary claims of individual class members for subsequent trial. Pet. App. 4a. The decree was preliminarily approved by the district court, pending notice to class members and a fairness hearing.

The proposed consent decree contained provisions requiring sweeping changes in ALDOT's hiring and promotion policies, including alterations of the procedures for appointment of employees in various job classifications and an ambitious set of race-conscious hiring and promotional quotas designed to achieve 33.3% black representation in all merit system jobs at ALDOT. Pet. App. 4a.

In January 1994, before the fairness hearing, a group of non-black ALDOT employees (the "Adams Intervenors") moved to intervene in the lawsuit on behalf of themselves and all ALDOT employees who were not part of the plaintiff classes. *Id.* The Adams Intervenors filed objections to certain race-conscious provisions of the consent decree, such as the 33.3% quota requirement for all ALDOT job classifications, claiming that these provisions would adversely affect their interests and discriminate against them on the basis of race. The motion to intervene was granted in February 1994, and, in April 1998, the district court certified the Adams Intervenors as a class "for the purpose of intervention, that is to challenge the race-conscious provisions of the consent decrees." Pet. 3.

One of the specific provisions to which the Adams Intervenors objected was Article Thirteen, ¶ 4, the provision at issue in this proceeding. This paragraph requires defendants to promote to the Graduate Civil Engineer ("GCE") job classification any black ALDOT employee

who has a college degree in civil engineering or civil engineering technology, but is not already employed in a professional engineering job classification, regardless of whether the employee (a) ever applied for the GCE job classification or (b) can show that the defendants' allegedly discriminatory job requirements precluded him from applying. Pet. App. 52a.

More than 200 people attended the January 19, 1994 fairness hearing, including many non-black ALDOT employees. Pet. App. 5a. The objections to the race-conscious aspects of the proposed consent decree were such that the parties withdrew it and, with leave of court, went back to the drawing board. By late February 1994, the plaintiffs and defendants decided to divide the previously proposed decree into three parts, called Consent Decrees I, II, and III. Consent Decree I contained the provisions (some of which were modified as a result of negotiations with the Adams Intervenors) that all sides agreed provided only race-neutral prospective relief. Consent Decree II contained provisions that the Adams Intervenors contended were impermissibly race-conscious, but that the plaintiffs contended were race-neutral. Consent Decree III contained provisions that all parties agreed were race-conscious.

The parties submitted Consent Decree I to the district court for approval, and, on March 7, the court held a hearing on the fairness of the proposal. No one other than the parties' attorneys appeared at the hearing, and no one objected to the entry of the decree. The court approved Consent Decree I and, by order entered March 16, 1994, adopted it in full. Pet. App. 6a. The district court noted

that it would "consider final approval of Consent Decrees II and III separately at a later time." Pet. App. 6a.

2. Article Thirteen, ¶ 4 and Related Provisions

By this action, the plaintiffs attacked a broad range of defendants' hiring and promotional policies, including the requirements for appointment and promotion as an engineer. Among other things, plaintiffs challenged as discriminatory the requirement of successful completion of the Engineer in Training ("EIT") examination for appointment to the GCE job classification. Plaintiffs claimed that the EIT requirement was imposed for the discriminatory purpose of rejecting black applicants whom defendants would otherwise have been required to hire as GCEs.

The parties' original proposed Consent Decree contained numerous provisions related to the EIT requirement and the GCE job classification. With the sole exception of Article Thirteen, ¶ 4, these provisions were entered as part of Consent Decree I. For example, under Consent Decree I:

1. EIT status cannot be used as either a minimum requirement or as a scoring, ranking, or certification device for the GCE job classification. Pet. App. 142a.

2. ALDOT is required to notify all recruitment sources and to advertise in Alabama newspapers that EIT certification is no longer a requirement for appointment to the GCE job classification and that Black engineers are invited to apply. Pet. App. 149a-150a.

3. A number of African-Americans injured by the EIT requirement were granted immediate appointment to the GCE position or "the job they would now hold" in the absence of the EIT and associated requirements. These included ten black employees who were listed on the register for the GCE classification in 1983, when the register was abolished and the EIT requirement was instituted. Pet. App. 144a-145a.

4. Preferential hiring consideration is given to an even larger group of African-Americans injured or potentially injured by the EIT requirement. Pet. App. 150a-151a.

The Adams Intervenors did not object to any of these provisions, and all of them have been entered by the district court and have either been implemented or are being implemented by defendants. The sole EIT-related provision challenged by defendants and Adams Intervenors is the provision that was entered four years later and is the subject of this appeal: Article Thirteen, ¶ 4. Pet. App. 52a. That provision grants an automatic promotion to any black employee who has a degree in civil engineering or civil engineering technology, but nonetheless holds a job at a lower level than the GCE job classification, even if that employee never applied for the GCE classification and cannot show that he or she would have applied in the absence of the EIT requirement.

Defendants take issue with plaintiffs' contention that the "reclassifications" required by Article Thirteen, ¶ 4 would simply change the title of the position already held by the benefited employee and would not fill any

vacancy that would otherwise be available for competitive appointment. Pet. 5. This statement not only lacks evidentiary support, but also is untrue. The personnel system provides specifications for the kinds of work to be performed by employees in each classification. If an employee's duties in his or her current classification were not proper for a GCE, the duties would have to be changed upon redesignation of that employee as a GCE. Furthermore, ALDOT's organization calls for GCEs in certain types of positions. If an employee is designated as a GCE, one of those positions may well become filled.

As a corollary, plaintiffs also incorrectly state that GCE is the "correct classification nomenclature" for a degreed engineer. Pet. 5. The GCE classification does require a degree, but there are degreed engineers in other engineering classifications as well.

3. Defendants' Withdrawal of Support for Consent Decrees II and III

In November 1995, the district court ordered plaintiffs, defendants, and Adams Intervenors to address the legality of Consent Decrees II and III in light of the Eleventh Circuit's decisions in *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994), and *In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525 (11th Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995). Pet. App. 10a n.11. These two cases, decided after plaintiffs and defendants had negotiated the original consent decree and submitted it to the district court for approval, addressed the legality under Title VII and the Equal

Protection Clause of certain race-conscious provisions of consent decrees entered into by government employers.

Defendants concluded that *Ensley Branch* and *In re Birmingham* "substantially clarified the application of previous Supreme Court precedent" to race-conscious provisions in consent decrees and displayed a significantly more skeptical approach to race-conscious settlements than had prior Eleventh Circuit decisions. Pet. App. 10a n.11. Based on these new decisions, defendants concluded that the race-conscious provisions of Consent Decrees II and III violated both the Equal Protection Clause and Title VII. Pet. App. 10a. Defendants therefore objected to entry of Consent Decrees II and III and asked the district court to modify Consent Decrees II and III to eliminate race-conscious provisions because the obligations placed on defendants under those agreements "had become impermissible under federal law." Pet. App. 10a-11a n.11.

It should be noted that, unlike the Court of Appeals, defendants did not characterize their changed position on Consent Decrees II and III as a withdrawal of consent. Instead, defendants argued that the illegality and unconstitutionality of Consent Decrees II and III should preclude their approval by the district court.

4. Proceedings Leading to Challenged Order

In October 1997, in the midst of a seven-month trial of plaintiffs' individual claims in this action (which had not been settled by Consent Decree I), the district court asked the Adams Intervenors to state their position on the legality of Article Thirteen, ¶ 4. Pet. App. 8a n.9. The

Adams Intervenors replied that this provision was impermissible, because it granted promotions to black employees who neither applied for the GCE job nor would have applied but for challenged job requirements. The Adams Intervenors concluded that Paragraph 4 was race-conscious and not remedial, because it was not tied into identifying actual victims of discrimination and making them whole.

On January 14, 1998, the district court asked the parties whether black ALDOT employees who fell within the terms of Article Thirteen, ¶ 4 would be entitled to back pay. The district court then asked the Adams Intervenors to restate their objections to the provision. Pet. App. 8a n.9. Once again, the Adams Intervenors explained that Article Thirteen, ¶ 4 was unlawful because it applied to black employees who had never applied for the GCE classification and had not been deterred from applying by the EIT requirement, and hence had never been injured by the challenged EIT requirement. The court also asked for a clarification of the defendants' position. Defendants replied unequivocally that they objected to the challenged paragraph. *Id.* On January 16, 1998, the district court asked plaintiffs how many black ALDOT employees would be affected by Article Thirteen, ¶ 4. *Id.*

The district court never permitted the defendants or Adams Intervenors to present evidence in support of their objections to Article Thirteen, ¶ 4 or to any other race-conscious provisions of Consent Decrees II and III. Instead, the defendants and Adams Intervenors have been permitted to argue based only on evidence received in the plaintiffs' case during the 1992 partial trial. On

January 23, 1998, without further argument or briefing by the parties on the legality of Article Thirteen, ¶ 4, and with no briefing or argument whatsoever about the propriety of entering a single provision from Consent Decree II, the district court entered an order and injunction adopting Article Thirteen, ¶ 4. Pet. App. 8a; Pet. App. 16a. The order, which overruled defendants' and the Adams Intervenors' objections to the provision and denied defendants' request to modify it to comply with Title VII and the Equal Protection Clause, enjoined defendants from failing to implement Article Thirteen, ¶ 4. Pet. App. 44a.

In entering this order, the district court gave a comprehensive summary of evidence presented by plaintiffs during the aborted 1992 trial. Most of the evidence cited by the court had no relationship to the EIT requirement, the GCE job classification, or Article Thirteen, ¶ 4. None of the evidence was analyzed to determine whether the challenged race-conscious provision was necessary or appropriate, particularly in light of the many provisions in Consent Decree I that were specifically tailored to remedy any past injury with respect to the EIT requirement and GCE classification. Moreover, contrary to plaintiffs' characterization, Pet. 5, the district court could not make factual "findings" with respect to the appropriateness or necessity of the challenged provision based solely on the plaintiffs' evidence from the interrupted 1992 trial without giving defendants or the Adams Intervenors the opportunity to rebut this evidence.

B. The Court of Appeals' Decision

The Court of Appeals reversed the decision of the district court on two independently sufficient grounds. First, the Court of Appeals found that Consent Decrees II and III in general, and Article Thirteen, ¶ 4 in particular, "[l]ack[ed] the consent of all of the parties." Pet. App. 13a. Accordingly, the Court held that the district court had no power to enter the decree "purportedly based on consent." Pet. App. 13a. Second, the Court concluded that the district court's entry of the challenged paragraph *sua sponte* was "procedurally improper." Pet. App. 15a. The Petition does not challenge this alternative holding as to the procedural irregularities in entering the order.

The Court of Appeals' conclusion that Article Thirteen, ¶ 4 "[l]ack[ed] consent of all of the parties" was in turn based on the following:

1. The Adams Intervenors, whose legal rights would be affected by the provision, had not consented:

> [T]he intervenors have legal rights at stake in this litigation, namely rights under the Equal Protection Clause, Title VII, and state merit-system law to compete for state jobs on a race-neutral basis. The clear law of this circuit is that "a consent decree requires the consent of all parties whose legal rights would be adversely affected by the decree." *United States v. City of Hialeah*, 140 F.3d 968, 975 (11th Cir. 1998); *see also White v. Alabama*, 74 F.3d 1058, 1073 (11th Cir. 1996) ("In this circuit, a decree that provides a remedy agreed to by some, but not all, of the parties cannot affect the rights of a dissenting

> party."); *id.* at 1076 (Black, J., specially concurring) ("Once a party intervenes, he becomes a full participant and is entitled to have his claims litigated."). The consent of the intervenors is thus needed for the challenged paragraph to be entered as a "consent decree."

Pet. App. 11a-12a n.12.

2. The defendants had "withdrawn" their consent after informing the district court that they believed that Consent Decrees II and III were unconstitutional. Pet. App. 10a.

3. "Pulling one isolated paragraph out of a proposed consent decree runs counter even to what the parties originally agreed upon back in 1993, for a 'settlement must stand or fall as a whole.' " Pet. App. 13a (quoting *Brooks v. Georgia State Bd. of Elections*, 59 F.3d 1114, 1120 (11th Cir. 1995) (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1331-32 (5th Cir. 1977))).

Of these three alternative grounds for finding that the challenged provision could not be entered as a "consent" order, the Petition challenges only the first two.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

There are no compelling reasons for granting the writ in this case. Contrary to plaintiffs' argument, there is no circuit split as to either of the issues addressed in the Petition. Moreover, the Eleventh Circuit cited two other, independently sufficient reasons for its ruling, which are not even challenged in this proceeding. Accordingly,

defendants submit that the Petition presents no issue worthy of this Court's review.

I. There Is No Circuit Split with Respect to an Intervenor's Right To Object to or "Veto" a Consent Decree that Adversely Affects His or Her Legal Rights

Plaintiffs argue that the Eleventh Circuit's decision in this case is in direct conflict with decisions of other courts of appeals by holding "that the consent of non-minority employees is needed for black employees to settle lawsuits for racial discrimination against their employers." Pet. 8-9. The Eleventh Circuit did not so hold. Rather, it held that the Adams Intervenors' consent would be required in this case, because they "have legal rights at stake in this litigation, namely rights under the Equal Protection Clause, Title VII, and state merit-system law to compete for state jobs on a race-neutral basis." Pet. App. 11a n.12.

Quite simply, the rights of intervenors with respect to consent decrees are not an all or nothing proposition. The Eleventh Circuit has never held that all intervenors may veto consent decrees, and no other court has held that intervenors never have the right to do so. Each case, whether in the Eleventh Circuit or elsewhere, turns on whether the consent decree affects the legal or property rights of the intervenor. An intervenor's vested legal rights may not be compromised without due process. Therefore, if those rights would be adversely affected by a proposed consent decree, the intervenor is entitled to a full evidentiary hearing on the merits. As the Eleventh

Circuit held in *United States v. City of Hialeah*, 140 F.3d 968 (11th Cir. 1998):

> It is true that opposition to a proposed consent decree will not always operate as a bar to it. . . . However, the objection of a party whose rights or claims would be adversely affected does bar a proposed consent decree.

Id. at 975.

The paragraph at issue in this case grants certain promotions based on race without regard to whether the promoted employee even claims to have been a victim of racial discrimination. There can be no serious doubt that such a provision "adversely affects" the legal rights of members of the Adams Intervenor class who might otherwise be able to compete for promotions into those positions on a race-neutral basis. In addition to their rights under the Constitution and Title VII, such intervenors are entitled, as public employees, to the protection of Alabama's merit system law, which expressly provides that "[p]romotion shall be based on merit and competition." ALA. CODE § 36-26-23 (1975).

Because the provision at issue would adversely affect the legal rights of the Adams Intervenors, the decision in this case does not conflict with any decision of this Court, the Eleventh Circuit, or any other Court of Appeals.

A. The Eleventh Circuit Decisions

As the Eleventh Circuit has recognized, the intervenors' rights are controlled by this Court's decision in *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986). In *Local No. 93*, this Court held the

district court could enter a consent decree in an employment discrimination case over the objections of the Union, which had been permitted to intervene. *Local No. 93* certainly stands for the proposition that intervention alone – even intervention of right – does not confer upon a party the right to veto all proposed consent decrees. This Court expressly recognized, however, that such consent decrees could not "dispose of the claims of a third party . . . [or] impose duties or obligations on a third party, without that party's agreement." 478 U.S. at 529. Moreover, the Court's decision was premised on its assessment that "the consent decree does not purport to resolve any claims the Union might have under the Fourteenth Amendment, . . . under § 703 of Title VII, . . . or as a matter of contract." 478 U.S. at 530 (citations omitted).

In its first decision to address this issue, *White v. Alabama*, 74 F.3d 1058 (11th Cir. 1996), the Eleventh Circuit relied on *Local No. 93* and on controlling precedent from the former Fifth Circuit, namely, *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981) (en banc), in concluding that "a decree that provides a remedy agreed to by some, but not all, of the parties cannot affect the rights of a dissenting party." *Id.* at 1073.

Two years later, in *Hialeah*, the Eleventh Circuit again held that "to the degree a consent decree diminishes a party's legal rights, it cannot be entered over that party's objections." 140 F.3d at 978. In reaching this conclusion, the court engaged in a comprehensive analysis of *Local No. 93* to determine whether, as urged by the dissenting opinion, *Local No. 93* conflicted with *White* or *City of Miami*. The *Hialeah* court concluded that Eleventh Circuit

law was completely consistent with *Local No. 93*, reasoning:

> [E]ven if we were writing on a clean slate we would interpret *Local No. 93* the same way *White* did.
>
> . . . [*Local No. 93*] explicitly recognizes that a consent decree cannot dispose of the contractual rights of objecting parties. The *Local No. 93* Court affirmed entry of the consent decree in that case because "the consent decree does not purport to resolve any claims the Union might have . . . as a matter of contract." 478 U.S. at 530, 106 S. Ct. at 3079. The union intervenor in *Local No. 93*, unlike the intervenors in this case, did not assert any legal rights that would be impinged by the consent decree. *See* 478 U.S. at 508-11, 106 S. Ct. at 3067-69. Apparently, no established collective bargaining rights were affected by the decree, because the union did not contend that any were.
>
> As the Supreme Court pointed out in *Local No. 93*, the district court provided the objecting union with several opportunities to advance specific objections and to develop evidence to substantiate those objections; the court even informed the union that vague appeals to fairness could not prevent entry of the decree. *See id.* at 528-29, 106 S. Ct. at 3078-79. Instead of detailing specific claims as to how the decree would impair the rights of its members, the union merely protested that "there must be a more equitable, fair and just way to correct the problems caused by the [City]," and that it was totally opposed "to the use of racial quotas which must by their very nature cause serious racial polarization." *Id.* at 511, 106 S. Ct. at 3069.

> As the Supreme Court characterized it, the union simply "express[ed] its opinion as to the wisdom and necessity of the proposed consent decree." *Id.* That is entirely unlike *City of Miami* and this case, where the intervenors have objected based upon their specific legal rights under Florida law, rights that the decree would abrogate.

Id. at 979-80 (footnotes omitted).

The *Hialeah* opinion also rejected the dissenting opinion's conclusion that, under *Local No. 93*, "an objecting party's existing legal rights can be sacrificed to the interests of the other parties, without a trial, so long as the intrusion on those rights does not obligate that party 'to do or not to do anything' ":

> That would mean, for example, that the other parties could agree to use a "consent decree" to cut the wages of the objecting union members, in violation of their contractual rights, if the other parties deemed it necessary and appropriate to do so in order to fund aspects of the remedy put into place by the decree. Under the rule advocated by the dissenting opinion, the union members whose wages were being cut over their vehement objection would not be entitled to bar the settlement or to insist upon a trial. What would matter is that they were not being ordered to do anything by the decree. The City could take care of the paperwork and other affirmative acts necessary to actually reduce their compensation. Such are the implications of the dissenting opinion's interpretation of *Local No. 93*, which is an interpretation we are

> confident never occurred to the Supreme Court, and is also an interpretation foreclosed by *White*.

Id. at 980.

Plaintiffs contend that, prior to its decision in this case, the Eleventh and former Fifth Circuits had given veto rights only to intervenors "who had pre-existing *contractual rights* that were being involuntarily forced to yield to a consent decree that they opposed." Pet. 13. Again, the Petition mischaracterizes the case law in an attempt to create the appearance of a conflict. In *White*, which is not cited in the Petition, the right that was jeopardized by the proposed consent decree was not contractual, but was the intervenors' "right to vote for judicial officers." 74 F.3d at 1074.

Moreover, the decision in *City of Miami* was based, ultimately, on a conflict between the consent decree and a Miami Civil Service Ordinance providing "that eligibility for promotion was determined solely on the basis of the employee's score on a civil service test." 664 F.2d at 446. Because the intervenor in *City of Miami* was a union, rather than a class of affected employees, the conflict between this ordinance and the consent decree did not end the inquiry as to the intervenor's rights. Rather, the court was required to look to the collective bargaining agreement to determine whether the union had standing. Because the agreement provided that the ordinance was to "remain in full force and effect for the duration of this Agreement," the court concluded that the consent decree could not be entered without the Union's consent. *Id.* If the intervenors had been the employees themselves, rather than the union, the employees' direct rights under

the ordinance would have been entitled to the same deference.

Like the union members in *City of Miami*, the Adams Intervenors have statutory rights to compete for civil service positions on a race-neutral basis. ALA. CODE § 36-26-23 (1975). Thus, contrary to plaintiffs' arguments, the Eleventh Circuit was not required to "extend" its precedent in order to conclude that the challenged paragraph of Consent Decree II would have required the consent of the Adams Intervenors, because "the intervenors have [Constitutional and statutory] legal rights at stake in this litigation." Pet. App. 11a n.12.

B. Decisions of Other Circuits

The Petition contends that, unlike the Tenth and Eleventh Circuits, other circuits have held that "third-party intervenors have no right of consent or veto over settlements by other parties." Pet. 12. Contrary to this argument, none of the cases plaintiffs cite from other jurisdictions holds that an intervenor is never entitled to insist on a trial on the merits. Rather, these cases, like those of the Eleventh and former Fifth Circuits, turn on whether the intervenor's legal rights would be adversely affected by the proposed consent decree.

1. *Edwards v. City of Houston*, 37 F.3d 1097 (5th Cir. 1994), *vacated*, 78 F.3d 983 (5th Cir. 1996) (en banc). As plaintiffs acknowledge, the 1994 panel decision in *Edwards* was vacated. Plaintiffs' characterization of this vacatur as being "on other grounds" is questionable. Even more importantly, the quotation cited at Pet. 12-13 is

not from the vacated majority opinion, but from the concurring opinion of Judge Parker, who joined in the dissenting opinion in the 1996 *en banc* review. Needless to say, Judge Parker's concurring opinion cannot be cited as circuit precedent.

The 1996 majority opinion of the Fifth Circuit *en banc* addressed only the issues before the court, which were (a) whether the district court erred in denying the appellants' motion to intervene and (b) whether that error was harmless. On the issue of harmlessness, the court differentiated between the rights of objectors and intervenors, holding that intervenors have the right not only to argue and brief the issues, but to participate in discovery and present evidence. There is no indication that the would-be intervenors even argued that they had the right to a full trial on the merits.

Plaintiffs' reliance on *Edwards* is particularly surprising in light of the Fifth Circuit's discussion of the rights of intervenors. After noting that the putative intervenors had not been permitted to participate in discovery or present witnesses at the "fairness hearing," the court concluded:

> The perfunctory process employed in this case belittles our notion of fairness. That these applicants were deprived not only of the opportunity to participate in this proceeding with the rights and privileges of full parties, but also of the opportunity to adequately prepare and present objections to the proposed decree, precludes us from concluding that the district court's denial of intervention was harmless.

78 F.3d at 1003. The process employed in the present case did not meet these standards of fairness.

2. *Kirkland v. New York State Dept. of Correctional Servs.*, 711 F.2d 1117 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). In *Kirkland*, the court expressly acknowledged that an intervenor may have the right to "force a trial," depending on "the nature of the intervenor's interest." The court held:

> [T]he sum of rights possessed by an intervenor, even if granted unconditional intervention, is not necessarily equivalent to that of a party in a case and depends upon the nature of the intervenor's interest.

Id. at 1126. The court's decision that the non-minority intervenors did not have the right to insist on a trial was based on its assessment that the intervenors' interest was limited to "their mere expectation of promotion pursuant to possibly discriminatory selection procedures." *Id.* at 1128. Significantly, the court distinguished the Eleventh Circuit's *City of Miami* decision on the facts, rather than expressing disagreement with its holding.

3. *Dennison v. City of Los Angeles Dept. of Water & Power*, 658 F.2d 694 (9th Cir. 1981). In *Dennison*, the union did not contend that its legal rights were infringed by the consent decree. In fact, although it had notice of the action before the fairness hearing, the union never sought to intervene. Rather, the union later filed a separate action seeking monetary compensation for two non-minority employees who alleged that they were adversely affected by the consent decree. The court held that this suit was an impermissible collateral attack on

the consent decree. Thus, in commenting that the fairness hearing had "adequately afforded the union an opportunity" to express its views, the court was not expressing an opinion as to the due process rights the union would have had if its legal rights had been jeopardized by the consent decree and if it had sought to intervene. *Id.* at 696.

4. *United States v. Union Elec. Co.*, 132 F.3d 422 (8th Cir. 1997). The court held that intervenors have no "*unconditional* right to an evidentiary hearing" (emphasis added) and that, because the intervenors were "not bound by" the Consent Decree's allocation formula to which they objected, the district court did not abuse its discretion in denying a hearing. *Id.* at 430.

5. *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275 (1st Cir. 2000). *Comunidades*, a community organization, intervened in an action brought by the government to redress alleged violations of the Clean Water Act and other environmental statutes. *Comunidades* did not contend that its legal rights were infringed by the consent decree. The court did not hold that an intervenor is never entitled to a trial on the merits, but only that there is "no *unconditional* right to an evidentiary hearing." *Id.* at 279 (emphasis added).

6. *United States v. Oregon*, 913 F.2d 576 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991). The State of Idaho opposed the proposed decree, not on the basis that it infringed any legal rights, but "chiefly because it provides insufficient protection for Idaho wild steelhead, which Idaho believes could face extinction." *Id.* at 580. The court held that the district court properly could deny

Idaho the right to cross-examine witnesses at the fairness hearing. *Id.* at 582.

7. *Tennessee Ass'n of Health Maintenance Orgs., Inc. v. Grier,* 262 F.3d 559 (6th Cir. 2001) ("*Grier*"). In *Grier,* the court held that the intervenors could be bound by the consent decree over their objections, because they contractually agreed to be bound and because they were agents of the State, one of the consenting parties. *Id.* at 565. Not surprisingly, the court held that the intervenors could voice their objections, but had no right to an evidentiary hearing. *Id.* at 567.

8. *Youngblood v. Dalzell,* 804 F.2d 360 (6th Cir. 1986), *cert. denied,* 480 U.S. 935 (1987). In *Youngblood,* in contrast with the Eleventh Circuit's decision in *City of Miami,* the court found that the "consent decree did not interfere with any right secured by collective bargaining" and "imposed no duties or obligations on the [intervenor] union." *Id.* at 364. Accordingly, the court held that the consent decree "is not invalid merely because the union did not agree to it." *Id.*

9. Finally, as the Petition acknowledges, *Sanguine, Ltd. v. United States Dept. of Interior,* 798 F.2d 389 (10th Cir. 1986), *cert. denied,* 479 U.S. 1054 (1987), is entirely consistent with the Eleventh Circuit's decision in the present case in holding that an intervenor is entitled to a trial where his "valuable property rights" are at stake. *Id* at 392.

Thus, contrary to plaintiffs' argument, there is no circuit split with respect to the rights of intervenors objecting to proposed consent decrees. In each case, the intervenors' due process rights depend upon the nature

of their interests. Accordingly, this issue need not be addressed by this Court.

II. There Is No Circuit Split with Respect to a Party's Right To Withdraw Its Consent to a Proposed "Consent Order" that Has Not Received the Consent of all Parties and Violates Third Parties' Constitutional and Statutory Rights

Defendants had the right to withdraw their consent to Consent Decrees II and III for two reasons. First, as discussed above, the Consent Orders required the consent not only of the plaintiffs and defendants, but also of the Adams Intervenors, who were necessary parties with respect to their race-conscious provisions. Although the court's approval of a consent decree might be regarded as a condition *subsequent*, a condition *precedent* to the formation of a contract is the agreement of all parties. If two parties "agree" to settle a three-party dispute, they are both free to withdraw from the "agreement" if the third party does not acquiesce. Consequently, Consent Decrees II and III never rose to the level of enforceable agreements, and plaintiffs and defendants were both free to withdraw their consents in light of the objections of the Adams Intervenors.

Second, although a party may not be permitted to withdraw from a settlement based on a mere change of heart, plaintiffs can cite no authority for the proposition that a party may be bound by a proposed consent decree that would violate third parties' constitutional and statutory rights. Indeed, in *Local No. 93*, this Court held that, although a consent decree may provide for "broader

relief than the court could have awarded after a trial," the parties may not "agree to take action that conflicts with or violates the statute upon which the complaint was based." 478 U.S. at 526, *quoted in White v. Alabama*, 74 F.3d 1058, 1074 (11th Cir. 1996). As became clear from intervening Eleventh Circuit decisions, Consent Decrees II and III violated Title VII, as well as other statutory and constitutional rights of third parties. Because, under *Local No. 93*, the parties "may not agree" to such provisions, it should follow that, where a party has agreed to illegal provisions out of ignorance, it must be permitted to withdraw its consent.

Most of the cases cited in the petition do not involve an illegal consent decree, much less one discovered to be illegal after its submission to the court. The issue in *King v. Walters*, 190 F.3d 784, 790 (7th Cir. 1999); *United States v. North Carolina*, 180 F.3d 574, 582 (4th Cir. 1999); *Moore v. Beaufort County*, 936 F.2d 159, 164 (4th Cir. 1991); *Pennsylvania Steel Foundry & Mach. Co. v. Secretary of Labor*, 831 F.2d 1211, 1220 (3rd Cir. 1987) (declining to decide whether administrative review commission had "power" to permit a party to withdraw consent); and *Collins v. Thompson*, 679 F.2d 168, 172-73 (9th Cir. 1982); *George Banta Co. v. NLRB*, 604 F.2d 830, 834-36 (4th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) (declining to decide whether special circumstances might justify withdrawal of consent), was whether a party was free to withdraw from a consent decree before its entry by the district court based on nothing more than that party's change of heart.

The only case that comes close to the issue presented here is *Ibarra v. Texas Employment Comm'n*, 823 F.2d 873 (5th Cir. 1987). The *Ibarra* court found, however, that it

need not reach the question of whether the proposed decree was legal because the case could be decided based on the Commission's "mistake" in believing that its legality was beyond question. *Id.* at 879. Rather than granting the Commission the right to withdraw on account of this mistake, the court reached the same result by holding that the district court abused its discretion in approving the consent decree under the circumstances. *Id.*

Plaintiffs appear to argue that defendants were bound to advocate approval of Consent Decrees II and III, but would be free to seek modification of the decrees in the event of their entry by the district court. Where a consent decree is illegal or unconstitutional, however, it may not be entered by the district court. If the district court may not enter a proposed decree because of illegality, the issue of whether the parties may or may not withdraw their consent is of no consequence. No purpose would be served by this Court's engaging in such a hair-splitting exercise.

Finally, plaintiffs argue that even if illegality justified withdrawal of consent, withdrawal could be permitted only if the trial court agreed that the consent decree was illegal. Of course, in the present case, the trial court entered the order adopting Article Thirteen, ¶ 4 without permitting the defendants or Adams Intervenors to present evidence in support of their objections.

Certainly, there can be no question that a party may not feign a concern as to the legality of a consent decree as an excuse to escape its provisions. If a court concludes that there is no reasonable basis for such a concern, the

parties' efforts to withdraw consent might fairly be disregarded. In light of the intervening decisions of the Eleventh Circuit in *Ensley Branch* and *In re Birmingham*, however, the district court could not conclude that defendants' objections were made in bad faith.

Indeed, the Eleventh Circuit may have concluded from the record that defendants' concerns about the legality of Consent Decrees II and III (or about Article Thirteen, ¶ 4 in particular) were well founded. If so, it is not surprising that this conclusion was not spelled out in the opinion. Because the district court's order was also defective due to procedural irregularities, lack of consent by the Adams Intervenors, and lack of consent to adoption of a single paragraph in isolation, further discussion about the legality of Article Thirteen, ¶ 4 would have been superfluous. Therefore, the Eleventh Circuit should not be faulted for failing to delve further into that issue before concluding that the defendants could withdraw their consent. At the very least, it is plain that the Eleventh Circuit did not consider defendants' concerns about the illegality of the race-conscious provisions to be unfounded or insincere.

In light of intervening Eleventh Circuit decisions addressing the legality of race-conscious provisions of consent orders and the lack of agreement by a necessary party, the Eleventh Circuit properly concluded that defendants could withdraw their consent from Consent Orders II and III. No issue worthy of a writ of certiorari arises out of this conclusion.

III. The Issues Raised in the Petition Are Not Dispositive, Because the Eleventh Circuit's Other Grounds for Reversing the District Court's Order Are Not Challenged

As previously discussed, the Adams Intervenors' objections and the defendants' withdrawal of consent to Consent Decrees II and III were only two of a number of grounds for the Eleventh Circuit's reversal of the district court's order. The Petition does not seek review of the Eleventh Circuit's conclusions that the order was improperly entered *sua sponte* or that the district court was not authorized to enter a single paragraph from a lengthier proposed consent decree.

Moreover, although not discussed at length in the Eleventh Circuit's decision, it is clear from the record that the procedures followed by the district court did not meet even the minimum due process requirements applicable to all intervenors. As this Court held in *Local No. 93,* even an intervenor whose legal rights are not infringed – and thus has no right to insist upon a full-blown trial – is entitled to "present evidence and have its objections heard at hearings on whether to approve a consent decree." 478 U.S. at 529. The district court made no pretense of permitting the Adams Intervenors to present such evidence before implementing Article Thirteen, ¶ 4. Rather, the only evidence received by the district court with respect to plaintiffs' discrimination claims was from the plaintiffs' unfinished case-in-chief during the aborted 1992 trial.

Because the Eleventh Circuit's decision is due to be affirmed for a multitude of reasons, this Court's review of

two of the articulated grounds for that decision would amount to a mere advisory opinion. Therefore, the issues raised by the Petition do not merit this Court's attention.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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No. 01-838

IN THE

Supreme Court of the United States

JOHNNY REYNOLDS, *et al.*,

Petitioners,

-and-

CECIL PARKER, *et al.*,

Petitioners,

v.

G. M. ROBERTS, in his official capacity as Director of the Alabama Department of Transportation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS WILLIAM ADAMS, *et al.*

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QUESTIONS PRESENTED

1. Whether a district court may enter an injunction without the consent of all parties affected by the injunction or a hearing or other proceeding providing due process on the matter which is the subject of the injunction.

2. Whether a district court may approve isolated portions of a proposed consent decree in piecemeal fashion instead of deciding whether to approve or reject the entire proposed decree.

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STATEMENT OF THE CASE

A. Early History and Consent Decree I.

The original complaint in this lawsuit was filed on May 21, 1985 by six African-Americans. Plaintiffs alleged that the Alabama Department of Transportation ("ALDOT") and the State Personnel Department ("SPD") had discriminated against them in their employment because of their race. The district court later certified three separate plaintiff classes of African-Americans. Pet. App. 17a, 18a.

On November 18, 1993, after a partial trial that lasted for several months, the plaintiffs and defendants tendered a partial settlement to the district court. Pet. App. 4a, 18a. The settlement was embodied in a proposed consent decree that provided for broad systemic classwide relief and left the monetary and non-monetary claims of individual class members for subsequent trial. Pet. App. 4a, 7a. At the time that the proposed consent decree was submitted to the district court, the plaintiffs had not yet finished presenting their evidence at trial. Pet. App. 4a, 5a. Hence, despite the lengthy trial record developed by plaintiffs, there is no finding of liability for racial discrimination in this case.[1]

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1. The trial record on classwide liability in this case consists of an uncompleted presentation of plaintiffs' case. Pet. App. 5a. In later proceedings, the district court found that the entry of Consent Decree I constituted a finding of classwide liability. That order was in effect at the time the district court entered the order appealed from in this case. In a separate appeal, which is now law of the case, the Eleventh Circuit vacated the district court's finding of classwide liability. Pet. App. 7a; *Reynolds v. Roberts*, 202 F.3d 1303 (11th Cir. 2000).

Following public notice of the proposed 1993 consent decree, a group of non-black ALDOT employees ("the Adams intervenors") filed objections to certain provisions of the proposed consent decree and were granted intervention. *Reynolds v. Roberts*, 846 F. Supp. 948, 954 (M.D. Ala. 1994); Pet. App. 4a, 5a. The Adams intervenors objected to race-conscious long-term and annual goal provisions requiring 33.3% black representation in all job classifications; "enhanced goal" provisions that carried forward unmet annual goal obligations indefinitely, specific set-asides of engineering positions for competition among black employees only and other race-conscious provisions of the proposed decree. Pet. App. 4a, 5a; R4-506.

The district court permitted the Adams intervenors to challenge the race-conscious provisions of the proposed decree as intervenors, 846 F. Supp. at 954, and subsequently certified a class of non-black employees to be represented by the named intervenors. Pet. App. 5a. The district court also permitted the Adams intervenors to file objections to the race-neutral provisions of the proposed decree, explaining that "the non-class member employees may only challenge the race-conscious provisions of the proposed decree as intervenors, but they may challenge the race-neutral provisions in their capacity as 'objectors' within the meaning of Section 108 of the Civil Rights Act of 1991." 846 F. Supp. at 954 n.8. Because the interrupted trial in the case had included a "vast amount of evidence of the Transportation Department's past employment practices," the district court did not permit the Adams intervenors to present additional factual evidence, but permitted the Adams intervenors to argue based only on evidence already received "that the factual predicate is not sufficient as a matter of law to warrant the type or extent of race-conscious relief contained in the proposed decree." *Id.*

During the initial hearing on the proposed 1993 decree, the district court urged the parties to sever the proposed decree into race-conscious and race-neutral relief and seek a negotiated resolution of the intervenors' objections. Pet. App. 5a.

The plaintiffs, defendants, and Adams intervenors subsequently engaged in discovery and negotiated revisions to both race-conscious and race-neutral provisions of the proposed consent decree. Pet. App. 5a. With the negotiated revisions, the original proposed consent decree was rewritten and then resubmitted by plaintiffs as three separate proposals: Consent Decree I, II, and III. Pet. App. 5a.

Consent Decree I contains classwide remedial provisions that all parties agreed were race-neutral and was entered on March 16, 1994. R6-553. The renegotiated Consent Decree I was entered on motion of the plaintiffs with the consent of the defendants and Adams Intervenors. Pet. App. 6a.

Consent Decrees II and III contain race-conscious provisions and, save for the single paragraph at issue here, have never been approved by the district court. The Adams intervenors have consistently opposed approval of Consent Decrees II and III. Pet. App. 5a. The defendants subsequently withdrew their approval of Consent Decrees II and III. Pet. App. 5a, 6a, n.4.

Since the entry of Consent Decree I, the Adams intervenors have actively participated in the ongoing proceedings in the district court. This litigation over the past eight years has been extensive, including proceedings before the District Judge and all four Magistrate Judges of the Middle District of Alabama. The Adams intervenors have

been involved in these proceedings in the district court to the extent that their employment interests are implicated and affected by the race-conscious relief consistently and constantly requested by the petitioners. In addition, the intervenors have actively sought to enforce and protect the race-neutral provisions of Consent Decree I to ensure that these remedies work effectively and thereby eliminate any need for race-conscious remedies. The district court has effectively taken plenary jurisdiction over all aspects of ALDOT's employment practices, thereby superseding the State merit system operated by the State Personnel Department.

B. The District Court's *Sua Sponte* Injunction.

On January 23, 1998, almost four years after Consent Decree II was tendered to the district court, the court *sua sponte* entered an Order and Injunction approving a single paragraph of Consent Decree II. Pet. App. 16a, *et seq.* Article XIII, paragraph 4 of Consent Decree II provided that ALDOT's black engineers with an engineering degree must be offered reclassification to the classification of Graduate Civil Engineer.[2]

The district court found that the single paragraph from the previously-proposed Consent Decree II was due to be approved based on the evidence presented by the plaintiffs during the partial 1992 trial proceedings. Pet. App. 19a. The district court, however, conceded that its factual "findings" were "only preliminary" and based on an admittedly incomplete record, as follows:

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2. The provision excepted those black engineers already in the higher classifications of Professional Civil Engineer or Graduate Registered Engineer. Pet. App. 17a.

> The [district] court recognizes and emphasizes that this picture is based solely on the plaintiffs' case. The defendants have yet to present their entire case. The findings are therefore only preliminary, and all the [district] court's comments throughout this order about the evidence should be taken as such.[3]

Pet. App. 12a, n.13. In addition, the district court found that the racial classification met the strict scrutiny standards of Equal Protection caselaw. Pet. App. 36a. For those reasons, the district court approved the single paragraph of the previously-proposed Consent Decree II and enjoined the defendants to comply with the paragraph. Pet. App. 44a.

C. The Eleventh Circuit's Decision.

The Eleventh Circuit reversed the district court's order finding it lacked any basis for entry of the *sua sponte* order and injunction.

The appeals court found that the single paragraph was not a proposed consent decree. First, the consent of the defendants to proposed Consent Decree II had been withdrawn in the four years since it was first proposed in 1994 due to intervening decisions addressing the lawfulness of race-conscious relief. Pet. App. 10a, 11a. Second, the

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3. In fact, the district court had precluded the defendants from presenting evidence on classwide liability issues (based on the district court's now-vacated finding of classwide liability). *See Reynolds II*, 202 F.3d at 1318. As the Eleventh Circuit noted, "the [district] court did not permit the Adams Intervenors to present additional factual evidence in support of their objections [to the provisions of proposed consent decrees II and III]." Pet. App. 5a.

single paragraph was never proposed as a settlement but was lifted by the district court from a broader proposed decree. The Eleventh Circuit recognized that approval of "one isolated paragraph out of a proposed consent decree" is contrary to the principle that a "'settlement must stand or fall as a whole.'" Pet. App. 13a. On that basis, the district court lacked authority to enter the single paragraph as a consent decree.

The appeals court found no other lawful basis for entry of the *sua sponte* injunction. There was never a motion seeking entry of the injunction. Pet. App. 13a. The evidence upon which it was based was from the 1992 trial that was never completed. No party was given notice or opportunity to respond to the evidence tendered by the plaintiffs in 1992. The appeals court found the entry of the injunction "procedurally improper" and reversed and remanded the matter for further proceedings. Pet. App. 15a.

REASONS FOR DENYING THE WRIT

Petitioners' Entire Argument Is Based On The Erroneous Assertion That The District Court's Order Approved A Proposed Settlement.

Petitioners claim that this Court should resolve an alleged split among the circuits whether settlements of race discrimination lawsuits that adversely affect the interests of nonminority employees who are also parties to the case may be approved over their objection. Pet. 8, 9. But, as the Eleventh Circuit made clear, the district court here did not approve a consent decree or a proposed settlement. In fact, the Eleventh Circuit expressly found that "this appeal does not involve a consent decree as such but rather an injunction

issued *sua sponte* by the district court." Pet. App. 9a. Petitioners choose to ignore this dispositive finding. The district court simply lifted and approved one paragraph from a proposed consent decree that had been tendered some four years earlier and entered that paragraph *sua sponte* as an injunction. While the appeals court correctly found that the requisite consent for Consent Decree II in its entirety was no longer present, even if it was, the district court lacked the authority to enter a single paragraph of the proposed decree as an injunction.

As the Eleventh Circuit recognized, the decisions of this Court are clear that a district court may not pick and choose from provisions of a proposed settlement without the consent of all of the parties. Pet. App. 13a. "[I]t is the parties' agreement that serves as the source of the court's authority to enter any judgment at all." *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 522 (1986). "More importantly, it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Id.* It is without dispute that *at no time* did the defendants or the intervenors consent to the entry of the challenged paragraph in isolation from the balance of Consent Decree II. Pet. App. 11a.

In *Evans v. Jeff D.*, 475 U.S. 717 (1986), this Court recognized that a district court generally has three options when considering a proposed settlement: (1) it can accept the entire proposed settlement; (2) it can reject the proposal and postpone the trial to see if a different settlement can be achieved; or (3) it can decide to try the case. 475 U.S. at 727. Here, even if Consent Decree II was still on the table as a proposed settlement, the district court did not follow

any of the three options. It chose to enter a single paragraph of the "settlement" as an injunction of the Court without seeking the consent of *any* of the parties. "[T]he power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed." 475 U.S. at 726.

Here, the district court entered its order without consent, without a motion for injunction, without considering the standards for injunctive relief, and without receiving evidence in opposition to the injunction. Petitioners' arguments about the process for approval of settlements are simply meaningless because there was no settlement to approve. The district court's action was so fundamentally wrong, it strains credulity that petitioners' able counsel can seriously represent that this case presents an appropriate vehicle for reviewing the questions presented in their petition.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PETITIONERS' REPLY BRIEF

Respondents, Defendants below ("Defendants"), argue against a grant of the writ on the grounds that no circuit splits exist either as to the power of a party to withdraw consent to a settlement or as to the necessity of consent by intervenors to a consent decree negotiated by the parties. Defs. Opp. 11-26. Defendants also assert that certiorari should be denied because the order was granted *sua sponte* and the portion of the Consent Decree at issue could be approved only if the entirety of the Decree was approved. Defs. Opp. 27-28. A second set of Respondents, Intervenors below ("Intervenors") join the Defendants in making the latter argument against granting the writ. Intvrs. Opp. 6-8. The circuit splits both on the question of the impact of a party's attempt to withdraw consent and on the power of intervenors are, however, extant and Respondents' efforts to reconcile the cases fail. The alternative "grounds" cited by Respondents were not the basis of the Eleventh Circuit's decision and do not affect the quality of this case as a vehicle for resolving the circuit splits.

The Eleventh Circuit's opinion rested on two legs. First, the court held that Defendants' opposition to Article 13, ¶ 4, on any ground, was a withdrawal of consent that barred the trial court from approving that portion of the consent decree. Alternatively, the Eleventh Circuit held that because the Intervenors did not consent to the entry of ¶ 4, the district court lacked the power to do so. Each of these holdings reflects a split in the circuits.

By its holding the Eleventh Circuit may factually have disappointed only one African-American college-trained engineer employee, see App. 39a at note 20, who is performing the same work as white college-trained engineers at substantially less pay. But the effect of its decision on the law governing consent decrees will have profound reverberations. If class action settlements can be undone by intervenors who assert no

independent claims or by a party that claims a change of heart before a decree receives final approval, settlements of large class actions will be virtually impossible to achieve. This Court should issue the writ of certiorari to resolve the two important circuit conflicts raised in this case.

I. THE "INTERVENOR CONSENT REQUIRED" CIRCUIT CONFLICT CANNOT BE DISTINGUISHED ON THE BASIS OF EQUAL PROTECTION AND TITLE VII RIGHTS COMMON TO ALL THE CIRCUIT DECISIONS AT ISSUE.

Defendants contend that the Eleventh Circuit's decision that non-minority intervenors must consent to settlement of minority employee's lawsuits is distinguishable from the decisions of other Courts of Appeals because the Eleventh Circuit based its decision on "'rights under the Equal Protection Clause, Title VII and state merit-system law.'" Def. Opp. 12 (*quoting Reynolds v. Roberts*, 251 F.3d 1350, 1357 n.12 (11th Cir. 2001), Pet. App. A-11a n.12). The Courts of Appeals that have reached the opposite conclusion about non-minority intervenors' rights to veto settlements, however, have considered the same Equal Protection, Title VII, and state merit-system rights as the Eleventh Circuit.

For example, the Second Circuit's decision in *Kirkland* reached the opposite result on the very same issue in the very same context as the current case — whether intervention by non-minorities affords them "equal standing with the original parties" so that "their consent would be required, and, in the event that they were dissatisfied with the agreement, they could then force a trial at which they would be permitted to defend the validity" of the underlying employment practice on the merits. *Kirkland v. New York State Dep't of Correctional Serv.*, 711 F.2d 1117, 1126-27 (2d Cir. 1983), *cert. denied, Althiser v. New York Dep't of Correctional Serv.*, 465 U.S. 1005 (1984). Contrary to the Eleventh Circuit, the Second Circuit held that

"[n]on-minorities do not have a legally protected interest in the mere expectation of appointments" and that such an expectation "does not require their consent as a condition to any voluntary compromise of the litigation." *Id.* In so holding, the Second Circuit considered the non-minorities' rights under state and local law, *id.* at 1127-1128, and adopted the Third Circuit's holding concerning non-minorities' Equal Protection and Title VII rights. *Id.* at 1126-27 (*citing EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 174-180 (3d Cir. 1977), *cert. denied,* 438 U.S. 915 (1978)). *See also EEOC v. American Tel. & Tel. Co.*, 556 F.2d at 173-180; *Airline Stewards & Stewardesses Ass'n v. American Airlines*, 573 F.2d 960, 963 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978); *Dawson v. Pastrick*, 600 F.2d 70, 74-76 (7th Cir. 1979); *Youngblood v. Dalzell*, 804 F.2d 360, 364-65 (6th Cir. 1986), *cert. denied, Cincinnati Firefighters Union, Local No. 48 v. Dalzell*, 480 U.S. 935 (1987).

Defendants argue that the Eleventh Circuit merely followed this Court's decision in *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529-30 (1986). The Eleventh Circuit's application of *Local No. 93,* however, is in conflict with that of other Courts of Appeals. As Defendants concede, the Eleventh Circuit reads *Local No. 93* to require the consent of intervenors to any relief that might affect them in some way, regardless of whether it affects intervenors' contractual or property rights. Def. Opp. 17. Other Circuits construe *Local No. 93* to *prohibit* recognition of any such veto right except in the narrow situation where the settlement "imposes obligations on a party that did not consent to the decree," *Local No. 93*, 478 U.S. at 539, or "purports to *resolve any claims* the Union might have under the Fourteenth Amendment, . . . under § 703 of Title VII, . . . or as a matter of contract." *Id.* at 529 (emphasis added). See, e.g., *United States v. Oregon*, 913 F.2d 576, 582 (9th Cir. 1990), *cert. denied, Makah Indian Tribe v. United States*, 501 U.S. 1250 (1991); *United States v. Communidades Unidas Contra La Contaminacion,* 204 F.3d 275, 279 (1st Cir. 2000);

Tennessee Assoc. of Health Maintenance Org., Inc. v. Grier, 262 F.3d 559, 567 (6th Cir. 2001).

Defendants also try to avoid the circuit conflict by arguing cases that involve the compromise of a Union's contractual rights without the Union's consent.[1] This case, however, raises no such issue; Intervenors sought no protection of contractual rights affected by the settlement. Instead, they seek merely to contest the merits of whether the affected minority employees (or employee as the case may be here) were really the victims of race discrimination.

Defendants argue Intervenors must have the right to insist upon a full trial on the merits of whether each black employee is, in fact, a victim of racial discrimination because if they are not, Intervenors' right to "compete" will be adversely affected. Def. Opp. 13. The Seventh Circuit explained the flaw in Defendants' reasoning in *Airline Stewards*.

> Intervenors essentially ask this court to require in excess of 100 mini-trials on issues dealing with the adequacy of each plaintiff's complaint and the availability of defenses. It seems to us beyond serious dispute that no reasonable parties are going to settle any case if an intervenor can force them to litigate separately the merits of each claim. . . .
>
> The only argument that intervenor offers to support a contrary result is that the district court had a duty to consider the interests of the incumbent employees before approving the settlement. We have no quarrel with that general proposition, but it certainly does not lead to the conclusion that the

1. *E.g.*, (1) *United States v. City of Hialeah*, 140 F.3d 968, 975 (11th Cir. 1998); (2) *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981); and (3) *Local No. 93*, 478 U.S. at 529.

> court had a duty to litigate the merits of the plaintiffs' claims prior to approving the settlement.

Airline Stewards, 573 F.2d at 963-964 (citation omitted).

Intervenors have not brought any discrimination claims themselves under the Equal Protection Clause, Title VII or any other law, but have only intervened to block settlement of black employees' claims against such discrimination. As this Court held in *Local No. 93*, "[i]t has never been supposed that one party — whether an original party, a party that was joined later, or an intervenor — could preclude other parties from settling their own disputes and thereby withdrawing from litigation." *Id.* at 528-529. Thus, "while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent." *Id.* If the current intervenors had brought substantive claims of their own, rather than merely intervened to be heard on the settlement of other parties' claims, they would have retained the right to trial on the merits *of their own claims* after the settlement of the other parties' claims has been approved. In this Court's own words, "[a] court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of non-consenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." *Id.* But Intervenors have no right to block the other parties' settlement by insisting upon a trial on the merits of such other parties' claims. *Id.*

II. THE RELIEF PROVIDED BY ARTICLE THIRTEEN, ¶4 DOES NOT ADVERSELY AFFECT ANY RIGHTS OR EXPECTATIONS OF NON-MINORITY INTERVENORS.

Contrary to Defendants' assertions, the settlement at issue does not provide "automatic promotions" or deprive any non-minority of a right to compete for a vacancy or promotion. The plain words of Article Thirteen, ¶4 provide for "reclassifications," not "promotions." App. D-52a; App. F-74a-76a; App. B-17a, 27a. Reclassifications, unlike promotions, involve reallocating an employee's *existing* position to a new classification. The reclassified employee has already won the position through competition and is simply having that same position placed in the correct classification and pay range for the duties he has been performing.[2]

State merit-system law requires such reallocations so that employees in "positions requiring duties which are substantially similar in respect to the authority, responsibility and character of the work required in the performance thereof" are included in the same classification that "shall be designated by a Title indicative of such duties."[3] *Ala. Code* § 36-26-13 (1975). The applicable state statute further requires that "[e]ach class

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2. An apt analogy would be to a school system that gives classroom teachers holding a master's degree a new title and compensates them on a different pay schedule. Placing a wrongfully classified teacher with a master's degree into the proper classification would not affect that teacher's duties (teaching in the assigned classroom) or fill a position that someone else could otherwise compete to fill. Such reclassification would correct the wrong, but would have no effect on the rights or benefits of any other teacher in the system.

3. Contrary to the Eleventh Circuit's assumption, there is no state merit system law that requires "competition" for the "reclassifications" involved in Article Thirteen, ¶ 4 of the settlement.

shall be so defined that the same requirements as to education" and "the same schedule of pay can be made to apply with equity under like working conditions." *Id.* The Rules of the State Personnel Board require that "[w]hen it is found . . . that a position is not in the most appropriate class, the Director shall reallocate it to the most appropriate class." *Rules of The State Personnel Board of Alabama* § 679-X-7-.06 (1993).

The settlement at issue was found by the district court to affect "fewer than a handful of African-Americans. . . ." App. B-39a.

> The record is unclear at this time, but it appears that there may be only one African-American (Benjamin Egiebor) to whom ¶ 4 still applies. App. B-39a n.20.

The terms of Article Thirteen, ¶4 restrict reclassification to persons who have been employed with a civil engineering degree but were placed in the wrong classification for persons with such an education. Defendants' argument that they are not "victims" of discrimination because they did not apply or show they were qualified is contrary to the plain terms of Article Thirteen, ¶4 which restrict eligibility for reclassification to persons who are already employed (hence, had applied for employment) and have the relevant qualification for the Graduate Civil Engineer classification — a degree in civil engineering or civil engineering technology. These *agreed-upon* criteria insure that only someone shunted into the wrong classification because of the defendants' discriminatory EIT practices would benefit from the operation of ¶4.[4]

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4. Defendants and Intervenors also urge that the Eleventh Circuit correctly reversed the district court because ¶4 was approved *sua sponte* independently. Defs. Opp. 27; Intvrs. Opp. 6-8. A motion to approve all of the provisions of Consent Decree II was, however, before the court so it makes little sense to characterize the district court's action as being

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III. DESPITE DEFENDANTS' ARGUMENTS, THE CIRCUITS DO NOT AGREE ON A PARTY'S RIGHT TO WITHDRAW FROM SETTLEMENT.

Petitioners have demonstrated that the Circuits do not agree on whether a party may withdraw unilaterally from a consent decree. See Pet. 15-21. Defendants argue that no conflict exists, because this case is unique: the Intervenors did not consent, and the relief awarded does not satisfy "strict scrutiny." This is but another way of arguing that the Defendants could withdraw their consent because the settlement had legal flaws. Def. Opp. 23-26. These grounds do not avoid the circuit conflict on this issue.

First, Defendants contend that the Intervenors' refusal to consent authorized their withdrawal from the settlement.[5] Defendants below knew that the Intervenors did not consent to the settlement at the time the settlement agreement was submitted to the trial court. The Intervenors participated in

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on its own motion. Nor was the court's action a surprise since it had asked the parties to brief the impact of that provision. Respondents' efforts to support the Eleventh Circuit's result because the district court's action amounted to an impermissible "blue lining' of a "contract" also fail. When the parties divided the original Consent Decree into three sections it was precisely to facilitate independent scrutiny of and passage of judgment on various provisions of the decree. Moreover, in context, Article 13, ¶4, belonged to Consent I, with the remainder of Article 13, which had long been approved by the court.

5. Defendants concede that the Eleventh Circuit was wrong in stating that they had withdrawn their consent from the settlement. Def. Opp. 7. Defendants advocated rejection of a settlement they previously accepted, and the Eleventh Circuit ruled that this rejection alone, even if Defendants' claims of illegality or unconstitutionality were meritless, was sufficient to preclude approval of the settlement. This is a matter as to which the circuits conflict.

negotiations, and their participation led to the creation of the three-part consent decree. This refusal did not lead the defendants to withdraw their consent; they knew about it all along. *Id.* 3-4.

The Eleventh Circuit's decision in this case and the Fifth Circuit's decision in *Ibarra* permit a party to withdraw its consent to a settlement. *See* App. A-11a-13a; *Ibarra v. Texas Employment Comm'n*, 823 F.2d 873, 879 (5th Cir. 1987) (permitting withdrawal from settlement on the grounds of mistake). In contrast, the other Circuits do not permit withdrawal of consent to settlement even where there are changed circumstances, much less where circumstances remain the same. In *United States v. North Carolina*, 180 F.3d 574 (4th Cir. 1999), the State was not permitted to withdraw its consent to a settlement, even after the enactment of State law requiring approval of settlements by the State legislature and attorney general. *Id.* at 581. *See also Moore v. Beaufort County*, 936 F.2d 159, 164 (4th Cir. 1991) (withdrawal not permitted, even after county board of commissioners learned of public opposition to the settlement). Similarly, the Third Circuit, in *George Banta Co. v. NLRB*, 604 F.2d 830 (3d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), held that an employer could not withdraw from a settlement, even when the union representing its employees brought new claims against the employer. *Id.*, 604 F.2d at 834. *Compare Collins v. Thompson*, 679 F.2d 168, 172-73 (9th Cir. 1982) (withdrawal not permitted for any reason because contract has been formed).

Furthermore, this Court has already rejected Respondents' argument that non-minorities must consent to settlements between governmental employers and their black employees. *Local No. 93*, 478 U.S. at 529. As explained above, intervenors only have veto rights if the settlement "imposes obligations on a party that did not consent to the decree," or "purports to resolve

any claims the [intervenor] might have under the Fourteenth Amendment, . . . Under § 703 of Title VII, . . . or as a matter of contract." *Id.*, 478 U.S. at 529, 530. Thus, the Intervenors' refusal to consent cannot justify unilateral withdrawal from a settlement; their consent is unnecessary in the first place.

Defendants' only other argument is a subjective concern that the settlement may not pass "strict scrutiny" under the Fourteenth Amendment. Under the precedent of the Third, Fourth and Ninth Circuits, this is no ground for withdrawal. If the settlement fails strict scrutiny, it will not be approved and no issue of unilateral withdrawal ever arises. And if the settlement satisfies strict scrutiny, as it did here, there is no need to withdraw because the settlement has been found to be lawful. *See Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986) (reversing appellate court's decision to require payment of attorneys' fees as part of settlement after concluding that they were required by 42 U.S.C. § 1988; court must reject a settlement it concludes is unlawful).

Despite Defendants' arguments, the circuit conflict remains. Three circuits have held that parties may not withdraw unilaterally from their settlements for *any* reason, while the Eleventh Circuit has permitted withdrawal for any reason, including concerns about strict scrutiny that the trial court definitively rejected.

CONCLUSION

This case presents a unique opportunity for the Court to resolve two important circuit conflicts. Certiorari should be granted.

Respectfully submitted,

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